(2) Supreme Court, U.S.
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In The OFFICE OF THE CLERK

Supreme Court of the United States

RICKY BELL, WARDEN,

Petitioner,

v.

GREGORY THOMPSON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME II, PAGES 202 TO 386

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at WINCHESTER

GREGORY THOMPSON *Petitioner*,	)	
v.	)	No. 4:98-cv-006
RICKY BELL, WARDEN, Riverbend Maximum Security Institution,	)	*Edgar*
Respondent.	)	

MEMORANDUM

(Filed Feb. 17, 2000)

This is a petition for the writ of habeas corpus under 28 U.S.C. § 2254; Gregory Thompson ("Thompson" or "petitioner") is presently incarcerated on death row. Before the Court is the respondent's answer to the amended petition and motion for summary judgment, the petitioner's traverse to the answer, and the petitioner's response to the motion for summary judgment. For the following reasons, the respondent's motion for summary judgment (Court File No. 81) will be **GRANTED**, and Thompson's petition and amended petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (Court File Nos. 3 & 17) will be **DISMISSED**.

I. Procedural Background

The State of Tennessee has provided the Court with copies of petitioner's state court proceedings. (Court File No. 5, Addenda 1A-K, 2-11, 12 A-K, 13-20; the record consists of 20 volumes of record, 3 video tapes, and 1 folder

of large trial exhibits). Petitioner was convicted of the first degree murder of Mrs. Brenda Blanton Lane and was sentenced to death by electrocution. (Technical Record of petitioner's pre-trial proceedings and criminal trial, criminal trial exhibits, transcript of the evidence, Addenda 1A-K). His conviction and sentence were affirmed on direct appeal. *State v. Thompson*, 768 S.W. 239 (Tenn. 1989).

Petitioner, through his court-appointed attorneys, Robert J. Warner, Jr. and Joseph E. Ford, filed the original petition for post-conviction relief on October 16, 1990, in the Circuit Court of Coffee County, Tennessee. Petitioner alleged several instances of ineffective assistance of counsel:

(a) Trial counsel failed to adequately investigate the background, personal, and medical history of petitioner to present mitigating evidence during the penalty phase of trial.

(b) Trial counsel failed to request and obtain adequate expert and investigative assistance regarding petitioner's head injuries during his youth, and failed to obtain adequate expert assistance regarding petitioner's competency at the time of petitioner's confession.

(c) Trial counsel failed to present an adequate defense at trial. Counsel failed to cross-examine numerous witnesses and failed to challenge the prosecutor's implication to the jury during his closing argument that petitioner was required to present a defense. Counsel repeatedly referred to the fact that Gregory Thompson "committed the act" and repeatedly referred to the "atrocity" and "horrible" nature of the crime.

(d) Trial counsel failed to cross-examine the district attorney about the district attorney's professional attorney's professional misconduct and racial bias.

(e) Trial counsel failed to request additional time from the trial court to properly prepare witnesses during the penalty phase of the trial. Counsel failed to prepare witnesses during the penalty phase of the trial. Counsel failed to prepare witnesses such as Arlene Cajulao for areas of cross-examination and failed to show witnesses documents that were later used for impeachment purposes of the witnesses in front of the jury.

(f) Trial counsel failed to adequately explain to petitioner potential conflict of interest of counsel and failed to allow petitioner the opportunity to select new counsel. Counsel also failed to insure the protection of petitioner's rights against self-incrimination by allowing petitioner to go to Central State Hospital for interrogation without the assistance of counsel.

(g) Trial counsel failed to object to jury instructions at the penalty phase which shifted the burden of proof to petitioner to show the existence of mitigating circumstances.

(h) Trial counsel failed to object to the jury's consideration of the victim's character in determining whether to impose the death penalty and during the state's case-in-chief.

(i) Trial counsel failed to object to jury instructions which limited the jury's individualized consideration of mitigating factors including, but not limited to, sympathy.

(j) Trial counsel failed to object to the inadequate jury instructions by the court concerning the death penalty and failed to object to the trial court's failure to tailor the instructions to the individual facts of the case. Counsel failed to present the Court with alternative jury instructions to remedy these deficiencies.

(k) Trial counsel failed to recuse themselves and withdraw from the appeal of petitioner once the issue of ineffective assistance of counsel was raised as an issue.

(l) Trial counsel failed to object to the exclusion of jurors based upon a religious test of said jurors in violation of Article 1, Section 6 of the Tennessee Constitution.

(m) Trial counsel failed to adequately investigate petitioner's military career. Counsel committed error by improperly raising the subject of petitioner's "good character" and "opened the door" for the prosecution to admit damaging information regarding petitioner in front of the jury.

(n) Trial counsel failed to raise such issues on appeal and was constitutionally ineffective in failing to raise and properly brief the claims which petitioner raised in his state post-conviction petition. Petitioner did not consent to representation by Mr. Richardson and Mr. Parsons on appeal and petitioner should have been appointed new counsel to represent his interest.

Petitioner also challenged the jury instructions given at the guilt phase, including but not limited to, the instruction

regarding inference that the killing was done maliciously; instructions which shifted the burden of proof on an element of the crime to petitioner; and inconsistent jury instructions that petitioner's confession was an acknowledgment of guilt. Petitioner also challenged the following jury instructions given at the penalty phase:

(a) Instructions that shifted the burden to petitioner to show the existence of mitigating circumstances;

(b) Instructions on aggravating circumstances which failed to narrow the class of person eligible for the death penalty;

(c) Instructions which limited the jury's consideration of mitigating factors including, but not limited to, sympathy.

(d) Instructions that diminished the jury's responsibility for imposing the death penalty;

(e) Instructions on aggravating circumstances were vague and overbroad and did not properly channel the jury's discretion and invited arbitrary, capricious and inconsistent application of the death penalty;

(f) Instructions which failed to advise the jury that they were the sole judges of the law and the facts during the penalty phase of the trial.

Petitioner also made numerous allegations to support his contention that the trial court committed reversible error in its conduct of the trial. Petitioner also alleged the state made numerous constitutional violations during trial. Petitioner alleged the Tennessee Death Penalty Statute is unconstitutional and that Thompson was not

competent to be executed. At the conclusion of an evidentiary hearing, the trial court denied the petition.

Petitioner appealed to the Tennessee Court of Criminal Appeals on the following issues:

(1) whether the post-conviction court erred by finding petitioner received effective assistance of counsel;

(2) whether the post-conviction court erred by denying funding for a psychologist or psychiatrist and an investigator;

(3) wether [sic] the post-conviction court erred by refusing to set aside the order designating Judge William Russell to hear this case and in refusing to reinstate Judge Buddy D. Perry;

(4) whether erroneous jury instructions defining deliberation and premeditation require reversal;

(5) whether the jury instructions on the "heinous, atrocious or cruel" aggravating circumstance were unconstitutionally vague;

(6) whether the petitioner's confession was unlawfully obtained and illegally admitted at his trial;

(7) whether the failure of the trial court to instruct the jury on the effect of non-unanimity and the option to recommend life imprisonment violated the petitioner's rights under the Eighth and Fourteenth Amendments;

(8) whether the trial court's allowing Dr. Watson to testify and introduce psychiatric/

psychological reports through his testimony was an unconstitutional denial of petitioner's rights;

(9) whether the petitioner was denied his constitutional right to a trial by jury by the exclusion of two prospective jurors; and

(10) whether the petitioner's constitutional rights were violated by implicit references to his failure to testify.

The Tennessee Court of Criminal Appeals affirmed the judgment of the trial court. Specifically, the Tennessee Court of Criminal Appeals found no merit in the first four issues that were appealed and that issues five through eight were previously determined by the Tennessee Supreme Court on direct appeal and that issues nine and ten were waived.

Thompson appealed the judgment of the Tennessee Court of Criminal Appeals affirming the trial court's denial of relief on his post-conviction petition. The Tennessee Supreme Court denied Thompson's application for permission to appeal. Thompson appealed the following issues to the Tennessee Supreme Court:

I. There is a need to secure settlement of important issues of law relating to the standard by which the competence of criminal attorneys is measured.

II. There exists the need to secure the settlement of an important issue of law with regard to what type of hearing an applicant is allowed under the ruling of *Owens v. State* and under what circumstances funds for expert services should be granted in a capital post-conviction case.

III. There is a need to settle the important issue of law regarding the effectiveness of Orders issues by a Judge in a capital post-conviction case when the Judge subsequently recuses himself.

IV. This court should exercise its supervisory authority by reviewing the decision to remove as trial Judge in the post-conviction action Judge Buddy D. Perry and replacing the same, without cause, with Judge William Russell.

V. This Court should review this case to settle the important question of law of the retroactive application of *State* v. *Brown*.

VI. There is a need to settle the important question of law as to whether the "heinous, atrocious or cruel" aggravating circumstance is unconstitutionally vague even when using the additional definitional terms from *State v. Williams*.

VII. There is a need to settle the important question of law regarding the admissibility of confessions under the heightened standard announced in *State v. Crump*.

VIII. There exists a need to settle the important question of law regarding the proper jury instruction of the affect of non-unanimity and the option to recommend life imprisonment.

II. Standard of Review

Thompson may obtain habeas relief if he can demonstrate he is in custody pursuant to the judgment of a state

court in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254. Under Rule 8 of the RULES GOVERNING SECTION 2254 PROCEEDINGS IN THE UNITED STATES DISTRICTS [sic] COURTS, the Court is to determine, after a review of the response, the transcript, record of state court proceedings, and the expanded record, whether an evidentiary hearing is required. If a hearing is not required, the district judge is to dispose of the case as justice dictates. The Court finds it is unnecessary to hold an evidentiary hearing in the present case.

Chapter 153 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 2414 (1996) ("AEDPA"), signed into law on April 24, 1996, has significantly amended Title 28 of the UNITED STATES CODE and altered the standard of review that a federal court must employ when deciding whether to grant a writ of habeas corpus. As amended, 28 U.S.C. § 2254(d) (1997) provides as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

As amended, 28 U.S.C. § 2254(e) provides as follows:

> (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
>
> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –
>
> (A) the claim relies on-
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

Thompson filed his application for a writ of habeas corpus on June 12, 1998, after the effective date of AEDPA. The United States Supreme Court has instructed that the AEDPA generally applies to cases filed after the

act became effective. *See Lindh v. Murphy,* 521 U.S. 320 (1997) (holding the new provisions of Chapter 153 generally apply only to cases filed after the effective date of the Act). The Sixth Circuit has previously held that the provisions of the AEDPA, including the amended standard of review apply in cases filed after April 24, 1996. Therefore, revised §§ 2254(d) and (e) govern the inquiry as to whether or not *habeas corpus* relief is appropriate in this case.

Federal courts must now give greater deference to the determinations made by state courts than they were required to do under the previous law. *Spreitzer v. Peters,* 114 F.3d 1435, 1441 (7th Cir.), *modified on other grounds,* 127 F.3d 551 (1997), *cert. denied*, 118 S. Ct. 1060 (1998); *Nevers v. Killinger,* 990 F. Supp. 844, 849-850 (E.D. Mich. 1997), *aff'd* 169 F.3d 352, *cert denied*, 119 S. Ct. 2340 (1999). These amendments to § 2254 mean that the "the federal courts must respect all reasonable decisions of the state courts." *Tinsley v. O'Dea,* 1998 WL 124045, *2 (Table, text at 142 F.3d 436) (6th Cir. March 12, 1998)) (UNPUBLISHED DECISION). *See also Harpster v. State of Ohio,* 128 F.3d 322 (6th. Cir. 1997), *cert. denied,* 118 S. Ct. 1044 (1998).

Although the United States Supreme Court and the Court of Appeals for the Sixth Circuit have not yet decided how to implement these new standards, this Court is guided by the Sixth Circuit's recent opinions in *Barker v. Yukins,* ___ F.3d ___, 1999 WL 1146742, at *4 (6th Cir. Dec. 15, 1999); *Nevers v. Killinger,* 169 F.3d 352, 357-362 (6th Cir. 1999), and *Harpster v. State of Ohio,* 128 F.3d 322 (6th Cir. 1997), *cert. denied,* 118 S. Ct. 1044 (1998). In those opinions the Sixth Circuit was confronted with mixed questions of law and fact and the Sixth Circuit

determined it must decide whether the state court decision involved an unreasonable application of clearly established federal law, as determined by the Supreme Court. In *Nevers,* the Sixth Circuit "determined that, as a general rule, the (unreasonableness of a state court's application of clearly established Supreme Court precedent will not be 'debatable among reasonable jurists,' if it is 'so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes.'" *Nevers,* 169 F.3d 362. Therefore, in the Sixth Circuit, a writ may issue only if reasonable jurists would find a state court's application of federal law was so arbitrary, unsupported, or offensive to existing precedent as to fall outside the realm of plausible credible outcomes.

In determining how to apply the basic habeas test announced in *Nevers* to the specific issue of whether the state court's finding of harmless error involved an unreasonable application of federal law, the Sixth Circuit has determined that

> [[T]he] test is *whether* the error "had substantial and injurious effect or influence in determining the jury's verdict," [and] it is the habeas petitioner's burden to demonstrate that the trial error resulted in "actual prejudice," If the petitioner is able to make that showing, he will surely have demonstrated that the state court's finding that the error was harmless beyond a reasonable doubt . . . was outside the realm of plausible credible outcomes, and therefore resulted from an unreasonable application of [federal law].

Barker v. Yukins, ___ F.3d ___, 1999 WL 1146742, at *4.

The Sixth Circuit discussed the opinions of other circuits regarding the standard of review. The Fifth Circuit reads § 2254 as addressing three distinct challenges to a state court's decision. It has interpreted the "contrary to" clause in § 2254(d)(1) as addressing questions of pure law; the "unreasonable application" clause in § 2254(d)(1) as addressing mixed questions of law and fact; and § 2254(d)(2) as addressing questions of pure fact. The Seventh Circuit has articulated an approach very similar to that of the Fifth Circuit. *See Lindh v. Murphy,* 96 F.3d 856, 870 (7th Cir. 1996) (en banc) *rev'd on other grounds.*

The Eleventh Circuit developed an approach similar to that of the Fifth and Seventh Circuits. *See Neelley v. Nagle,* 138 F.3d 917 (11th Cir. 1998). The Eleventh Circuit first determines the clearly established law at the relevant time. Then, the Eleventh Circuit applies the "contrary to" clause to errors of pure law and the "unreasonable application" clause to mixed question of law and fact. In *Neelley,* the Court found "two situations in which a state court decision would be 'contrary to' clearly established Supreme Court" precedent under that phrase's plain meaning: " . . . when a state court faces a set of facts that is essentially the same as those the Supreme Court has faced earlier," but reaches a different result; and when a state court "fails to apply the correct legal principles," as enunciated by Supreme Court case law, to decide a case. *Id.* at 923.

A state court's determination of a factual issue is presumed correct and the petitioner can rebut the presumption only by clear and convincing evidence. *Nevers,* 990 F. Supp. at 850. The challenge to a mixed question of law and fact requires the application of the second clause of § 2254(d)(1), and habeas relief will not be granted unless the state court's decision amounted to an unreasonable

application of clearly established federal law, as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d)(1); *Harpster,* 128 F.3d at 326. "Mixed questions of law and fact are those decisions which require the application of a legal standard to fact determinations." *Nevers*, 990 F. Supp. at 850 (*citing Thompson v. Keohane,* 516 U.S. 99, 109-11 (1995)).

The Sixth Circuit has recently addressed what constitutes an unreasonable application of clearly established Federal law in *Nevers,* 169 F.3d at 362. The Sixth Circuit held that in arriving at the correct answer to the question of unreasonableness,

> [t]he deference to the state courts' judgments required by the AEDPA is achieved by adopting the rule that the unreasonableness of a state court's application of clearly established Supreme Court precedent will not be "debatable among reasonable jurists," *Drinkard v. Johnson,* 97 F.3d[751] at, 769[(5th Cir. 1996), *cert. denied,* 520 U.S. 1107 (1997)], if it is "so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes," *O'Brien [v. Dubois,]* 145 F.3d [16] at 25 [1st Cir. 1998].

Nevers, 169 F.3d at 362.

Some of the grounds asserted by Thompson in support of his present § 2254 petition for writ of habeas corpus are similar to the grounds asserted by Thompson in his appeal in the Tennessee courts. The review in this case involves an identical record to that considered by the state courts, a factor the Supreme Court has considered important in measuring the deference to be given to those courts. *See Sumner v. Mata*, 449 U.S. 539, 547 (1981).

The respondent has filed a motion for summary judgment. (Court File No. 81). FED. R. CIV. P. 56 provides that summary judgment will be rendered if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. "Summary judgment is proper (if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *Johnson v. Turner,* 125 F.3d 324, 332 (6th Cir. 1997) *(quoting* FED. R. CIV. P. 56(c)). The burden is on the moving party to conclusively show that no genuine issue of material fact exists, and the Court must view the facts and all inferences to be drawn therefrom in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Morris v. Crete Carrier Corp.*, 105 F.3d 279, 280-81 (6th Cir. 1997); *White v. Turfway Park Racing Ass'n, Inc.*, 909 F.2d 941, 943 (6th Cir. 1990); *60 Ivy Street Corp. v. Alexander*, 822 F.2d 1432, 1435 (6th Cir. 1987).

The moving party is not required to support a motion with evidence disproving the nonmoving party's claim but only needs to show the district court that there is an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986); *Hartsel v. Keys,* 87 F.3d 795, 799 (6th Cir. 1996), *cert. denied*, 519 U.S. 1055 (1997). "The pivotal question is whether the party bearing the burden of proof has presented a jury question as to each element of its' case." *Hartsel,* 87 F.3d at 799, *citing Celotex*, 477 U.S. at 322.

Hearsay evidence is not considered on a motion for summary judgment. *Hartsel*, 87 F.3d at 799. "The mere

possibility of a factual dispute is not enough." *Id.* (Citations omitted). A court is required to make a preliminary assessment of the evidence when deciding whether plaintiff's evidence concerns a material issue and is more than *de minimis. Id.*

"Only factual disputes that might affect the outcome of a lawsuit under substantive law are 'material.'" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Cable v. Calhoun County Jail*, 124 F.3d 196, 1997 WL 595090, at *1 (6th Cir. Sept. 25, 1997). To qualify as a genuine issue as to any material fact, a dispute must involve evidence which a jury could find for the non-moving party. *Cable*, 1997 WL 595090, at *1. The moving party has the burden of showing there is an absence of evidence to support the non-moving party's case. *Id.*, at *1. Once the moving party presents evidence sufficient to support a motion under Rule 56, the nonmoving party is not entitled to a trial merely on the basis of allegations. The nonmoving party is required to come forward with some significant probative evidence which makes it necessary to resolve the factual dispute at trial. *Celotex Corp. v. Catrett*, 477 U.S. at 324-325; *White*, 909 F.2d at 943-44; *60 Ivy Street*, 822 F.2d at 1435. "The plaintiff must present more than a mere scintilla of evidence in support of her position; the plaintiff must present 'evidence on which the jury could reasonably find for the plaintiff.'" *Hartsel*, 87 F.3d at 799 (*quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 252).

The nonmoving party cannot rest on pleadings and allegations, but must present probative evidence which necessitates a resolution of the factual dispute at trial, *Mathis v. Bowater, Inc.*, 985 F.2d 277, 278 (6th Cir. 1993). If the nonmoving party fails to carry his or her burden by not making a sufficient showing of an essential element of

his or her case, summary judgment is appropriate. *Celotex*, 477 U.S. at 323. The moving party is entitled to summary judgment if the nonmoving party fails to make a sufficient showing on an essential element of the case with respect to which it has the burden of proof. *Celotex*, 477 U.S. at 323; *Collyer v. Darling*, 98 F.3d 211, 220 (6th Cir. 1996), *cert. denied*, 520 U.S. 1267 (1997).

The judge's function at the point of summary judgment is limited to determining whether sufficient evidence has been presented to make the issue of fact a proper jury question, and not to weigh the evidence, judge the credibility of witnesses, and determine the truth of the matter, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 249; *60 Ivy Street*, 822 F.2d at 1435-36. The standard for summary judgment mirrors the standard for directed verdict. The Court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52 *see also Lapeer County, Mich. v. Montgomery County, Ohio*, 108 F.3d 74, 78 (6th Cir. 1997). There must be some probative evidence from which the jury could reasonably find for the nonmoving party. *Anderson*, 477 U.S. at 252; *Bailey v Floyd County Bd. Of Educ.*, 106 F.3d 135, 140 (6th Cir. 1997). If the Court concludes that a fair-minded jury could not return a verdict in favor of the nonmoving party based on the evidence presented, it may enter a summary judgment. *Anderson*, 477 U.S. at 251-52; *University of Cincinnati v. Arkwright Mut. Ins. Co.*, 51 F.3d 1277, 1280 (6th Cir. 1995); *LaPointe v. UAW Local 600*, 8 F.3d 376, 378 (6th Cir. 1993).

After reviewing, under the summary judgment standards, each ground asserted by Thompson, this Court

concludes that he received a full and fair hearing on the merits of each issue he raised in the state court on his direct appeal from his conviction and in his post-conviction petition. This Court further finds that the state courts adequately resolved the questions of law and fact; and their decision did not involve an unreasonable application of clearly established Federal law as determined by the Supreme Court or an unreasonable determination of the facts. 28 U.S.C. §§ 2254(d)(1) and (2).

III. Factual Background

The following brief recitation of the facts is taken from the Tennessee Court of Criminal Appeals opinion:

> On January 1, 1985, the petitioner and Joanne McNamara, a juvenile, kidnaped the victim, Brenda Lane, at knife point in a Wal-Mart parking lot in Shelbyville, Tennessee. Thompson forced the victim to drive them to an isolated area outside Manchester, Tennessee, where he stabbed her four times in the back and then abandoned her. Thompson and McNamara returned to Georgia and attempted to burn the vehicle. After his arrest, the petitioner confessed to the crime and assisted authorities in locating the body. His confession was introduced as evidence during the trial.
>
> At the penalty phase of the trial several witnesses testified petitioner was a well-behaved, good student prior to leaving home in 1979. The petitioner's girlfriend, Arlene Cajulao, testified about his life after he left home, when he was in the military service and stationed in Hawaii. Dr. George Copple, a clinical psychologist, testified about the general abilities of the petitioner and

> what kinds of work he could perform during his imprisonment. Dr. Robert Watson testified that the petitioner exhibited anti-social adult behavior, was not remorseful, and malingered mental illness.

Thompson v. State, 958 S.W. 2d 156, 160 (Tenn. Crim. App. 1997).

IV. Analysis

Neither the original (Court File No. 7) nor amended petition (Court File No. 17) filed in this case complied with the verification requirements of 28 U.S.C. § 2242 or Rule 2(c) of the RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS, which provide that a petition for writ of habeas corpus shall be signed under penalty of perjury by the petitioner, Rule 2(c); or signed and verified by either the petitioner or by one acting on his behalf. 28 U.S.C. § 2241. This Court ordered the amended petition for writ of habeas corpus to be signed and verified and returned to the Court. Instead of abiding by the Court's order, counsel for petitioner returned the amended petition for writ of habeas corpus unsigned and unverified, along with a document titled verification of amended petition for writ of habeas corpus signed only by counsel.

The Court issued another order requiring Thompson to personally sign and verify the amended petition for writ of habeas corpus. However, counsel has notified the Court that counsel is unable to provide this Court with a verification bearing Mr. Thompson's signature. Counsel submitted an affidavit from his investigator which in pertinent part states as follows:

3. Since April 1999, I have only seen Greg once. On that occasion Greg was behaving strangely and acting out. Due to his erratic behavior our meeting was cut short.

4. On January 13, 2000, I traveled to Riverbend Maximum Security Institution in Nashville to obtain Greg's signature on a verification of his amended petition for writ of habeas corpus. Greg is housed in Unit One as opposed to Unit Two which is death row. A corrections officer informed Greg that I was there to talk to him about his case. Greg did not come out of his cell. The corrections officer said Greg has up and down days. He described Greg as withdrawn and keeping to himself.

Counsel submits he is acting on Thompson's behalf and in the past petitioner expressed his intent to pursue the remedy of habeas corpus and litigate his case to its conclusion. Counsel further states petitioner has never indicated a desire to dismiss this case. (Court File No. 121, p. 5). The Court acknowledges that counsel for Thompson is acting on Thompson's behalf, and the Court will accept counsel's verification of amended petition for writ of habeas corpus.

Petitioner filed an amended petition for writ of habeas corpus which included all allegations made in his original petition. (Court File No. 17). Thompson's [sic] makes numerous claims which the Court will address in the same order, using the same number sequence, as petitioner did in his petition. However, Claims 17 and 20 will be addressed together since both claims allege failure to fund mental health experts. First, the Court will address petitioner's contention that all of the claims the state

contends are procedurally barred, are simply unexhausted and the Court is required to dismiss the petition without prejudice unless respondent waives exhaustion. Petitioner argues that if the respondent waives exhaustion, all claims must be considered *de novo*.

A habeas petitioner must first exhaust available state remedies before requesting relief under § 2254. *See Granberry v. Greer*, 481 U.S. 129, 133-34 (1987); *Rose v. Lundy*, 455 U.S. 509, 519 (1982); Rule 4 RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS. A petitioner has failed to exhaust his available state remedies if he has the opportunity to raise his claim by any available state procedure. *Preiser v. Rodriguez*, 411 U.S. 475, 477, 489-90 (1973).

To exhaust these state remedies, the applicant must have presented the very issue on which he seeks relief from the federal courts to the courts of the state that he claims is wrongfully confining him. *Picard v. Connor*, 404 U.S. 270, 275-76 (1971); *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994). "[A] claim for relief in habeas corpus must include reference to a specific federal constitutional guarantee, as well as a statement of the facts which entitle petitioner to relief," *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996) (*citing Picard*, 404 U.S. at 271). "'[T]he substance of a federal habeas corpus claim must first be presented to the state courts.'" *Gray*, 518 U.S. at 163 (*quoting Picard*, 404 U.S. at 278). A habeas petitioner does not satisfy the exhaustion requirement of 28 U.S.C. § 2254(b) "by presenting the state courts only with the facts necessary to state a claim for relief." *Gray*, 518 U.S. at 163.

"It is not enough to make a general appeal to a constitutional guarantee as broad as due process to present the 'substance' of such a claim to a state court." *Id.* When a petitioner raises different factual issues under the same legal theory, he is required to present each factual claim to the highest state court in order to exhaust his state remedies. *See O'Sullivan v. Boerckel,* 119 S. Ct. 1728, 1732-33 (1999) (holding that exhaustion requirement mandates presentation of all claims to state court through discretionary review process). A petitioner has not exhausted his state remedies if he has merely presented a particular legal theory to the courts, without presenting each factual claim. *Pillette v. Foltz*, 824 F.2d 494, 497-98 (6th Cir. 1987). The claims must be presented to the state courts as [sic] matter of federal law. "It is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made." *Anderson V. Harless*, 459 U.S. 4, 6 (1982); *Duncan v. Henry*, 513 U.S. 364, 366 (1995) ("If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but state court."). *Cf. Gray*, 518 U.S. at 163.

Moreover, the state court must address the merits of those claims. *Coleman*, 501 U.S. at 734-35. If the state court decides those claims on an adequate and independent state ground, such as a procedural rule prohibiting the state court from reaching the merits of the constitutional claim, the petitioner is barred by this procedural default from seeking federal habeas review, unless he can-show cause and prejudice for that default. *See Wainwright v. Sykes*, 433 U.S. 72, 87-88 (1977).

When a petitioner's claims have never been actually presented to the state courts but a state procedural rule prohibits the state courts from addressing the claims, then those claims are deemed exhausted, but procedurally barred. *Coleman,* 501 U.S. at 752-53; *Teague v. Lane*, 489 U.S. 288, 297-99 (1989); *Wainwright v. Sykes,* 433 U.S. at 87-88; *Rust,* 17 F.3d at 160. A petitioner confronted with procedural default must show cause and prejudice for the default in order to obtain federal review of his claim. *Teague,* 489 U.S. at 297-99; *Wainwright v. Sykes,* 433 U.S. at 87-88. Cause for a procedural default depends on some "objective factor external to the defense" that interfered with the petitioner's efforts to comply with the procedural rule. *Coleman,* 501 U.S. at 752-53; *Murray v. Carrier*, 477 U.S. 478, 488 (1986). A petitioner may avoid the procedural bar, and the necessity of showing cause and prejudice, by demonstrating "that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman,* 501 U.S. at 750. The petitioner must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent of the crime," *Schlup v. Delo*, 513 U.S. 298, 327 (1995) (*quoting Murray,* 477 U.S. at 496). "To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Schlup,* 513 U.S. at 327.

Petitioner argues that any claim the state contends is procedurally barred should be reviewed *de novo* by the Court or the petition should be dismissed because it contains unexhausted claims. Petitioner contends these claims are simply unexhausted, not procedurally barred. Surely, counsel is aware the Tennessee statute of limitations for post-conviction relief bars petitioner from filing a

state post-conviction petition at this time. Therefore, his claims are not simply unexhausted, they are procedurally barred. Petitioner cites *Mapes v. Coyle*, 171 F.3d 408, 429 (6th Cir.), *cert. denied*, 120 S. Ct. 369 (1999) for the proposition that non-procedurally barred habeas corpus claims not considered on the merits in state court are reviewed *de novo*. Petitioner's counsel apparently overlooked the fact that *Mapes* applies to non-procedurally barred claims. Petitioner does not have any non-procedurally barred claims that were not considered on the merits in state court. Petitioner has procedurally barred claims that he failed to present to the highest Tennessee state courts.

Petitioner claims the Tennessee Supreme Court has held in *Burford v. State*, 845 S.W.2d 204 (Tenn. 1992); and *Sands v. State*, 903 S.W. 2d 297, 301 (Tenn. 1995), that, in deciding whether to apply the Tennessee post-conviction statute of limitations. Tennessee courts are to weigh the state's interest in finality against the importance of the underlying constitutional error. Presumably, he is arguing this Court is not allowed to dismiss claims on procedural default unless the Tennessee court has ruled petitioner is procedurally barred from filing a state post-conviction petition.

Petitioner misplaces his reliance on the *Burford* exception where the *Burford* court concluded, "that application of Tenn. Code Ann. § 40-30-102 to bar consideration of the petition in this case deprives Burford of liberty without due process of law." *Burford v. State,* 845 S.W.2d at 209). *Burford* is a very narrow exception which does not apply in the case before this Court. Burford's grounds for relief, (earlier enhancing convictions which were subsequently declared void) occurred after the state's highest appellate court action, and the question arose as to the

effect of the later arising grounds on the statute of limitations period. Burford did not have grounds upon which he could challenge his Trousdale County sentence until the Wilson County convictions were declared invalid. Furthermore, that court found that "[i]t was abundantly clear that the petitioner has a valid claim to have his sentence reduced, and all the Trousdale County court will have to do is examine the record of the Wilson county proceedings. The *Trousdale County* court can then resentence Burford using the appropriate consideration set forth in the Criminal Sentencing Reform Act." *Burford v. State,* 845 S.W. 2d at 209.

First, the Court notes that *Burford* deals with the effect of later arising grounds on the statute of limitations; and the case before this Court does not deal with later arising grounds. Petitioner also cites *Sands v. State,* 903 S.W.2d 297 (Tenn. 1995), presumably for the argument that if his procedurally defaulted claims were sent back to state court, the statute of limitations might not be strictly applied. In *Sands,* the Tennessee Supreme Court was addressing a previous version of Tennessee's Post-Conviction Act. Under the new Act, the exceptions are explicitly set forth in TENN. CODE ANN. 40-30-202(b)[1] and

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[1] (a) Except as provided in subsections (b) and (c), a person in custody under a sentence of a court of this state must petition for post-conviction relief under this part within one (1) year of the date of the final action of the highest state appellate court to which an appeal is taken or, if no appeal is taken, within one (1) year of the date on which the judgment became final, or consideration of such petition shall be barred. The statute of limitations shall not be tolled for any reason, including any tolling or saving provision otherwise available at law or equity. Time is of the essence of the right to file a petition for post-conviction relief or motion to reopen established by this chapter, and the one-year limitations period is an element of the right to file such an

(Continued on following page)

Thompson has failed to show that his claims fall within one of these exceptions.

Since Thompson's claims do not fall within one of the exceptions, it would be futile for Thompson to go back to state court. A federal court need not require a federal claim be presented to a state court if it is clear that the state court would hold the claim procedurally barred. *Harris v. Reed*, 489 U.S. 255, 263 n.9 (1989). Under the circumstances of this case, it would be futile for the Court

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action and is a condition upon its exercise, Except as specifically provided in subsections (b) and (c), the right to file a petition for post-conviction relief or a motion to reopen under this chapter shall be extinguished upon the expiration of the limitations period.

(b) No court shall have jurisdiction to consider a petition filed after such time unless:

(1) The claim in the petition is based upon a final ruling of an appellate count establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. Such petition must be filed within one (1) year of the ruling of the highest state appellate court or the United States supreme court establishing a constitutional right that was not recognized as existing at the time of trial;

(2) The claim in the petition is based upon new scientific evidence establishing that such petitioner is actually innocent of the offense or offenses for which the petitioner was convicted; or

(3) The claim asserted in the petition seeks relief from a sentence that was enhanced because of a previous conviction and such conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid, in which case the petition must be filed within one (1) year of the finality of the ruling holding the previous conviction to be invalid.

(c) This part contemplates the filing of only one (1) petition for post-conviction relief. . . .

to send this petitioner back to state court because it would be futile to pursue these procedurally-barred issues in state court. Exhaustion of state court remedies in this case is not required because all applicable statutes of limitations have expired, and any attempt to raise the unexhausted claim before the state court would be futile. *See Matlock v. Rose*, 731 F.2d 1236, 1240 (6th Cir. 1984) *cert. denier*, 470 U.S. 1050 (1985).

Petitioner does not set out his arguments relative to cause and prejudice concisely, but generally proffers ineffective assistance of post-conviction counsel as cause for his procedural default. Petitioner has no constitutional right to counsel in post-conviction proceedings. *Coleman*, 501 U.S. at 752. Since petitioner had no right to counsel in these proceedings in the first place, ineffective assistance rendered during the proceedings cannot serve as cause. *See Evitts v. Lucey*, 469 U.S. 387, 397 n.7 (1985) (holding that right to effective assistance of counsel depends on right to counsel itself). *See also Murray v. Giarrantano*, 492 U.S. 1, 10 (1989), *Pennsylvania v. Finley*, 481 U.S. 551 (1987).

Claim 17: ***INADEQUATE STATE PROCEDURE RESULTED IN THE DENIAL OF A FULL AND FAIR HEARING ON CONSTITUTIONAL VIOLATIONS; and***

Claim 20: ***DENIAL OF EXPERT FUNDING***

A. Denial of Expert Services

Petitioner claims he was denied funding for mental health and investigative experts at trial and during state post-conviction proceedings. (Court File No. 17, pp. 6-9, Claim 17). The question of whether the trial court erred by

failing to provide Thompson with funds to hire an independent expert witness is a mixed question of law and fact. Therefore, the Court must decide if the state court's denial of an expert witness "involved an unreasonable application of [] clearly established Federal Law as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1). *In Ake v. Oklahoma,* 470 U.S. 68, 83 (1985), the United States Supreme Court held:

> [W]hen a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Our concern is that the indigent defendant have access to a competent psychiatrist for the purpose we have discussed, and as in the case of the provision of counsel we leave to the State the decision on how to implement this right.

At a minimum, Ake requires the petitioner to make allegations supported by a factual showing that his sanity is in fact at issue in the case. *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1119 (6th Cir.), *cert denied,* 499 U.S. 970 (1991). Such a factual showing is not made by merely making a factually baseless claim that the defendant is insane or by entering a plea of not guilty due to insanity.

1. Denial of Funding for Experts at Trial

Petitioner's allegation that he was denied funding for mental health and investigative experts at trial "in all likelihood a word processing error more than any other[,]" according to petitioner's counsel. (Motion Hearing Transcript, pp. 40). Although petitioner's counsel informed the Court during the hearing on the respondent's motion for summary judgment that there was no claim being made regarding petitioner's access to mental health experts at trial, the Court will list the numerous pretrial motions and orders filed in the state trial court and the results of the proof at the trial court level to show what the state post-conviction court relied on when ruling upon motions for funds to pay mental health experts. The following motions and orders pertaining to requests for mental health and investigative experts are filed in Addendum 1A:

(1) Motion for Mental or Psychological Examination of Defendant – filed February 26, 1995 – requesting that a mental or psychological evaluation be ordered by the Court to determine whether petitioner was competent to stand trial and to determine his mental capacity at the time of the alleged commission of the crime.

(2) Supplementary Motion for Psychiatric Examination; and in Addition, for Neurological Examination – filed March 26, 1985 – requesting psychiatric evaluation and neurological examination of Thompson to determine whether Thompson was competent to stand trial and assist counsel with his defense, to determine whether Thompson was suffering from a mental illness on the date of the offense, and to determine

whether Thompson was in need of hospitalization for further psychiatric evaluation and/or treatment. A supporting affidavit by Thompson's trial attorney stated Thompson previously received two serious close-head injuries. When Thompson was sixteen years of age he was involved in a car wreck which resulted in Thompson being hospitalized with a serious concussion. The second injury occurred when he was in the United States Navy in 1981. He was beaten in the head with a hammer and received serious injuries, including, but not limited to, a concussion.

(3) Order Directing Forensic Evaluation by the Mental Health Center – March 28, 1985 – referring Thompson to the Multi-County Mental Health Center to determine Thompson's competency to stand trial and his mental capacity at the time of the crime.

(4) Order Directing Forensic Evaluation by the Mental Health Institute – April 4, 1985 – referring Thompson to Middle Tennessee Mental Health Institute to determine Thompson's competency to stand trial and his mental capacity at the time of the crime.

(5) Notice of Intent to use Industrial Psychologist – filed June 20, 1985, by Thompson of his intention to use the testimony of Dr. George Copple, a clinical psychologist regarding Thompson's mental conditions and abilities.

(6) Order (Ex Parte, Sealed) – filed July 29, 1985 – ordering that the charges of a private psychiatrist and pathologist, their

travel, motel and food expenses shall be paid by the executive secretary of the Supreme Court of the State of Tennessee for services performed by them on behalf of the defendant.

(7) Ex Parte Order – filed May 13, 1985 (Addendum 1B) – ordered that the requested sum of up to $800.00 shall be paid by the State of Tennessee to Dr. George Copple for services provided to Thompson.

(8) Ex Parte Order – entered August 13, 1985 (Addendum 1B) – approving that the State of Tennessee pay Dr. George Copple $300.00 per day for each day Dr. Copple attended the defendant's trial.

(9) Order Approving Attorney's Fees (Addendum 1B) – filed January 28, 1996 – approved payment of $945.00 to Dr. David K. Wheaton, a psychologist, for his consultation and testimony.

The murder was committed on January 1, 1985. (Court File 17, p. 2). On March 28, 1985, the state trial court, acting upon Thompson's motion, referred Thompson to the Multi-County Mental Health Center for certain forensic evaluations. (Addendum 1 A). The order directed the Multi-County Mental Health Center to evaluate Thompson for competency to stand trial, competency to assist counsel with his defense, and competency at the time the crime was committed. (Addendum 1A). Another order directing forensic evaluation was entered on April 4, 1985. Based upon motion of Thompson and based upon the recommendation of the Multi-County Mental Health Canter, Thompson was referred to Middle Tennessee Mental Health Institute for a maximum of thirty (30) days

for forensic evaluation. The trial court ordered the examination of Thompson by a team of examiners at Middle Tennessee Mental Health Institute, Thompson was sent to Middle Tennessee Mental Health Institute on or about April 18, 1985, and remained there for approximately a month. (Addendum 1 I, p.148). The report from Middle Tennessee Mental Health Institute was prepared in April of 1985 and found Thompson to be competent. The psychological findings failed to support a defense of insanity or a recommendation for judicial commitment. At Middle Tennessee Mental Health Institute Thompson was diagnosed as suffering from adult antisocial behavior. (Addendum 1 I, p. 62). The team specifically found:

> He exhibited none of the signs of an affective illness. His judgment and insight are rather poor. Psychological testing revealed him to be functioning in the average range intellectually, to exhibit no signs of organicity or brain damage on the Bender-Gestalt Test and the Bender Interference Procedure. Personality profiles revealed no evidence of a psychosis, but indicated malingering in the mental illness direction. (For example, the schizophrenic score was at T 120, while clinical observations revealed no evidence of a thought disorder.)

(Addendum 1 I, p.159).

Dr. George Ellis Copple, a clinical psychologist, testified on behalf of Thompson during the punishment phase of his trial. (Addendum 1 H, pp. 112-143; Addendum 1 I, pp. 2-98). Dr. Copple, at the request of Thompson's trial counsel, evaluated Thompson. (Addendum 1 H, p. 118). Dr. Copple's evaluation consisted of hours of testing and talking to Thompson, but mostly testing, and listening

to the witnesses during Thompson's trial. (Addendum 1 H, pp. 118-119).

Dr. Copple met with Thompson on May 15, 1985, at the Forensic Unit of the Middle Tennessee Mental Health Institute in private. Dr. Copple spent about three hours with Thompson giving him tests. (Addendum 1 H, p, 120). Dr. Copple gave Thompson some ability tests to determine what things Thompson might be capable of doing in a prison situation and what usefulness he might have to himself or others in a prison situation. (Addendum 1 H, p. 121).

Dr. Copple spent another three and one half hours with Thompson on August 2, 1985, at the Coffee County Jail giving him the Minnesota Multiplasic Personality Inventory, the Thematic Apperception Test, the Rotter Incomplete Sentences Blank, and the Rorschach or Ink Blot Test. (Addendum 1 H, pp. 124-126). Dr. Copple also met with Thompson for two twenty minute sessions after his trial began at Thompson's request. (Addendum 1 H, p. 127). Dr. Copple testified about Thompson's abilities and what jobs he could perform in prison. He also testified about Thompson's motivations in general and his behavior for which he was convicted as tied to his nurturant motivation. (Addendum 1Hh pp. 137-143, Addendum 1 I, pp. 2-6). Dr. Copple testified that Thompson's need to nurture "was very strong, strong enough to impel him to some unwise actions. . . . He had had opportunities to break this tie and this feeling of responsibility and protection he had with Joanne.[2] He had had numerous opportunities to do

[2] Joanne was the teenager with Thompson who distracted the victim by asking the victim for directions to the hospital so Thompson could come behind her and put a knife to her throat.

that, but he hadn't done that because of this inordinate or extremely strong drive to protect." (Addendum 1 I, p. 3). Dr. Copple further testified that Thompson is not crazy in any legal or psychiatric sense. Dr. Copple testified he did not think Thompson was abnormal or suffering from a mental illness, Dr. Copple administered the MMPI[3] and there was no indication that Thompson was crazy. (Addendum 1 I, p. 55-61).

The record clearly shows Thompson was provided with mental health experts and funds to pay for his own expert at trial. The trial court granted Thompson's motion for an independent state-paid psychiatrist and provided funds to pay an expert of Thompson's choice. Neither expert found Thompson to be incompetent or insane. Consequently, defense counsel did not put the experts on the witness stand during the innocence-guilt phase of the trial. Therefore, Thompson's claim for denial of an expert at trial will be **DISMISSED**. He is not entitled to any relief under § 2254.

2. *Denial of Funds for Experts at State Post-Conviction Proceedings*

Thompson claims the State of Tennessee denied him, the expert and investigative funding necessary to present his claims of constitutional error and then denied him a transcript of the hearing on the motion for expert services, thus precluding state review of the issue. The state contends this does not state a habeas claim because it does

[3] Thompson took the MMPI for Dr. Watson, and Dr. Watson concluded that Thompson attempted to take schizophrenia.

not go to the constitutionality of his conviction. Petitioner filed an *ex parte* motion for funds to pay a mental health expert and an investigator to assist with his post-conviction hearing. The motion was denied by the state post-conviction court. The motion was initially denied by Judge Ewell, who subsequently recused himself, and again by Judge Russell because petitioner failed to demonstrate a need for the requested funds.[4]

The writ of habeas corpus is not the proper means by which a prisoner should challenge errors or deficiencies in state post-conviction proceedings because these claims address collateral matters and not the underlying state

[4] This Court has reviewed the record, including the deposition of petitioner's recently hired expert, and does not find that Thompson demonstrated a need for the requested experts during his post-conviction hearing. The only issues before this Court regarding Thompson's mental health are his mental health at the time of the crime and at the time of trial. This Court does not find any evidence nor does Thompson cite any evidence that he was incompetent or mentally ill at the time he committed the crime or at the time of trial. The evidence introduced at trial through the testimony of the state's mental health expert and Thompson's mental health expert was that Thompson was neither incompetent nor insane.

Dr. Blair testified on petitioner's behalf during his state post-conviction hearing that she did not have an opinion about his diagnostic status in 1985, (Addendum 12 B, pp. 219-220). Petitioner claims experts recently obtained by him have revealed that he was incompetent under, Tennessee law at the time of the crime and throughout his court proceedings. Petitioner has failed to state the name of the expert and failed to provide the proof of these revelations. The Court has read the deposition of Dr. Crown, (Court File No. 119, Exhibit 1) who stated he was not asked to render any determination about whether or not Thompson was competent during his state jury trial. (Court File No. 91, Exhibit 1, pp. 7-9). Dr. Crown stated he was only asked to make a competency determination at the time he met Mr. Thompson on June 12, 1998 and he found petitioner to be competent on that date. (Court File No. 91, Exhibit 1, pp. 7-?).

conviction giving rise to the prisoner's incarceration. *Kirby v. Dutton,* 94 F.2d 245, 247 (6th Cir. 1986), "Claims attacking a state court's application of post-conviction procedures do not state a basis for a federal claim under 28 U.S.C. § 2254." *Gattis v. Snyder,* 46 F.Supp. 2d 344 (D.De. 1999). A claim challenging the state post-conviction proceedings fails to state a federal constitutional claim cognizable in a federal habeas proceeding. *Steele v. Young,* 11 F.3d 1518, 1524 (10th Cir. 1993); *Duff Smith v. Collins,* 973 F.2d 1175, 1182 (5th Cir. 1992), *cert. denied*, 507 U.S. 1056 (1993). "Even where there may be some error in state post-conviction proceedings, this would not entitle appellant to federal habeas corpus relief since appellants claim here represents an attack on a proceeding collateral to detention of appellant and not on the detention itself . . . Infirmities in state habeas corpus proceedings do not constitute grounds for federal habeas relief." *Vail v. Procnier*, 747 F.2d 277 (5th Cir. 1984). "Moreover, because state post-conviction proceedings are civil in nature, the Sixth Amendment right to effective assistance of counsel does not attach." *Noble v. Sigler*, 351 F.2d 673, 678 (8th Cir. 1965), *cert. denied*, 385 U.S. 853 (1966); *see also Coleman v. Thompson*, 501 U.S. 722, 752 (1991); *Kirby v. Dutton*, 794 F.2d at 246 n.1.

Section 2254 gives federal courts the jurisdiction to determine the constitutionality of a state criminal conviction, but not the authority to review state post-conviction proceedings, *Williams-Bey v. Trickey*, 894 F.2d 314, 317 (8th Cir.), *cert. denied*, 495 U.S. 936 (1990); *Mitchell v. Wyrick,* 727 F.2d 773, 774 (8th Cir.), *cert. denied,* 469 U.S. 823 (1984). The constitution does not require the states to provide a means of post-conviction review, therefore an infirmity in a state post-conviction proceeding does not

raise a constitutional issue and is not cognizable in a federal habeas petition. *Tokar v Bowersox*, 1 F. Supp. 2d 986, 1015 (ED. MO 1998), *aff'd*, ___ F.3d ___, 1999 WL 1116835 (8th Cir. Dec. 8, 1999); *Gee v. Groose,* 110 F.3d 1346, 1351-52 (8th Cir. 1997); *Jolly v. Gammon,* 28 F.3d 51, 54 (8th Cir.), *cert. denied,* 513 U.S. 983 (1994); *Williams-Bey v. Trickey,* 894 F.2d at 317. Accordingly, petitioner's claim that he was denied funds for experts during state post-conviction proceedings and denied investigative funding will be **DISMISSED.**

To the extent Thompson claims he was denied a full and fair state past-conviction hearing, the Court finds he has failed to set forth facts supporting this claim as required by Rule 2 of the RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS, and Thompson has failed to provide this Court with any substantial evidence that the state post-conviction court denied him a full and fair hearing. To the extent Thompson claims he was denied a full and fair hearing on this state post-conviction motion for funds to hire experts he has failed to cite to or produce that part of the record pertinent to this claim or to inform the Court that he is unable to produce such part of the record. *See* 28 U.S.C. § 2254(f).

Although, Thompson has failed to properly state this claim, this Court has read the state post-conviction transcript and does not find petitioner was denied a full and fair hearing.[5] After Judge Ewell denied the motion for

[5] Thompson claims he was denied a full and fair post-conviction hearing. Thompson claims the state post-conviction court denied him a full and fair hearing which prevented him from developing his claims Thompson was represented by counsel and presented evidence. His

(Continued on following page)

funds for experts,[6] he recused himself. Judge Buddy Perry was assigned the case and upon a motion to reconsider the denial of expert and investigative funds, Judge Perry stayed the matter pending the release of the Court of Criminal Appeals of Tennessee opinion in the case of *Owens v. State,* 1994 WL 112997 (Tenn. Crim. App. March 25, 1994), *rev'd in part,* 908 S.W.2d 923 (Tenn. 1995). However, Judge Perry was replaced by Judge Russell who specifically found, in denying the motion, that "[t]he issue of the petitioner's mental competency was thoroughly litigated upon his trial. The Court finds that there has been no demonstrated need for the funds requested, and the motion is again denied." (Addendum 12 A, p. 262).

The state past-conviction court noted that Thompson alleged mental incompetence at the time of trial[7] and incompetence at the time of his post-conviction hearing alleging his incompetence prevented him from being subjected to the death penalty. However, the post-conviction court found that those issues were abandoned in post-hearing brief and argument. The post-conviction count further found that based on the court's observation

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attorneys were permitted to introduce evidence and examine and cross examine witnesses. The state post-conviction court held a hearing and made finding of facts and ruled on the issues.

[6] Petitioner failed to submit the transcript of this hearing to the Court of Appeals or to this Court. Therefore, this Court is unable to review this transcript. However, the record supports the trial court's finding that petitioner did not demonstrate a need for funds to hire experts.

[7] The State trial court granted Thompson's notion for an independent state-paid psychiatrist (Dr. Watson) and provided funds to pay an expert of Thompson's choice (Dr. Copple). Neither expert found Thompson to be incompetent or insane. The proof at trial clearly indicated Thompson was not incompetent and did not indicate any mental health mitigating evidence.

of the petitioner and the evidence presented, the petitioner was not mentally incompetent. (Addendum No. 12 a, pp. 394-395).

The Tennessee Criminal Court of Appeals found that:

> Judge Ewell's order denying services was not rendered void by his subsequent recusal. Moreover, without the transcript of the hearing before Judge Ewell, we cannot conclude there was an abuse of discretion in denying the services. It is the burden of the appellant to prepare a record on appeal that presents a complete and accurate account of what transpired in the trial court with respect to the issue on appeal. Tenn. R. App. P. 24(b). The failure to do so results in a waiver of such issues and a presumption that the ruling of the trial court was correct. On the record before us, we cannot conclude the trial court abused its discretion by denying the services.

(Addendum 17, p. 31-32) (Citations omitted).

To the extent Thompson is claiming the state post-conviction court incorrectly determined from the facts he submitted that he did not demonstrate a need for mental health experts, this claim is without merit because he has failed to rebut the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1), Thompson failed to develop the factual basis of this claim in state court. Therefore, pursuant to 28 U.S.C. § 2254(2)(A) and (B),[8] this Court is prohibited from holding an evidentiary

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[8] (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that -

(Continued on following page)

hearing on this claim. To the extent Thompson claims his post-conviction counsel's failure to submit the transcript of the denial of funds is an excuse for his procedural default of this issue the Court finds this issue is without merit because there is no constitutional right to an attorney in state post-conviction proceedings. Consequently a petition cannot claim constitutionally ineffective assistance of counsel in such a proceeding. Therefore, Thompson must "bear the risk of attorney error that results in, a procedural default." *Coleman v. Thompson*, 501 U.S. 722, 752-53 (1991). Under *Coleman* the alleged ineffective performance of Thompson's attorney in the post-conviction proceeding cannot be "cause" for Thompson's procedural default. Consequently this claim is not cognizable in this federal habeas corpus proceeding.

After thoroughly reviewing this record, this Court is unable to find that Thompson provided any reason to support the appointment of another psychiatrist. A psychiatric examination is not an adversary proceeding. Its purpose is to determine Thompson's sanity and/or competency and any mitigating mental health evidence. Thompson does not have a right to the appointment of a psychiatrist who will reach a biased or favorable conclusion.

(A) the claim relies on -

(i) a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

Therefore, Thompson's claim for denial of experts at his post-conviction hearing and denial of a full and fair post-conviction hearing will be **DISMISSED**. He is not entitled to any relief on these issues under § 2254.

Claim 18: QUALIFIED REQUEST FOR FURTHER AMENDMENT

Petitioner requests leave to amend his petition should additional relevant facts be disclosed in the future. This case is presently before the Court on a motion for summary judgment and petitioner has not filed any further amendment. During oral argument counsel for petitioner stated this claim is "somewhat mooted." Therefore, this Claim 18 will be **DISMISSED** as **MOOT**.

Claim 19: TRIAL COUNSEL'S CONFLICTS OF INTEREST

Petitioner claims he was denied his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by virtue of the appointments of attorneys John W. Rollins and H. Thomas Parsons, who suffered from actual conflicts of interests. Thompson claims John W. Rollins suffered a conflict due to his concurrent and active representation of Coffee County, Tennessee, during critical stages of Mr. Thompson's state court proceedings. Petitioner claims H. Thomas Parsons suffered a conflict due to his concurrent and active representation of the Sheriff of Coffee County during critical stages of Mr. Thompson's state court proceedings. Parsons represented the Coffee County Sheriff in an unrelated civil matter in federal district court. Petitioner claims H. Thomas Parsons was burdened by an additional conflict of interest by the

fact he was actively engaged in a financial relationship with the prosecuting attorney, Charles Buck Ramsey.[9]

The Supreme Court of Tennessee addressed the issue of conflict of interest regarding the attorney's representation of Thompson and the county or sheriff when Thompson appealed his conviction. As noted by the Supreme Court of Tennessee, both attorneys quickly moved to withdraw after being appointed to represent Thompson. Furthermore, Mr. Rollins did not confer with petitioner and took no part in his representation and was relieved on April 9, 1985. On the same day Mr. Doyle Richardson was substituted as co-counsel. *State v. Thompson,* 768 S.W.2d 239, 244 (1989).

On June 20, 1985, Mr. Parsons was relieved as counsel for Thompson by order of the Tennessee Court of Criminal Appeals because of the possibility that the Sheriff's subordinates would give material testimony at trial. On July 5, 1985, Mr. Richardson, on behalf of Thompson, moved to have Mr. Parsons re-appointed since the conflict was resolved by the settlement of the Sheriff's civil suit. On July 10, 1985, the court of criminal appeals ordered his reappointment. *Id.*

The Supreme Court of Tennessee did not find any actual conflict. "[T]he conflict claimed here was only a potential one and quite remote; and it was resolved before trial. Without a showing of prejudice – and an attorney's good faith assertion of his disqualification is not in itself

[9] Mr. Parson testified that the fact he helped General Ramsey, the prosecuting attorney, in some way in his financial matters did not enter into the trial of this case in any respect. Furthermore, Thompson apparently signed a waiver waiving any objection to the possible conflict (Addendum 12B, pp. 35-36).

ineffective representation – there is no denial of counsel." *Id.* Furthermore, the evidence shows that only one Sheriffs employee testified at trial and his testimony was limited to establishing the chain of custody of the knife found by the road crew. The majority of the investigation was conducted by the Tennessee Bureau of Investigation.

Petitioner has not alleged nor does this Court find that the state court's decision was contrary to or an unreasonable application of established federal law as determined by the United States Supreme Court, or that it involved an unreasonable determination of the facts in light of the state court evidence. Accordingly, Thompson's claim that he was denied his constitutional rights due to trial counsel's conflict will be **DISMISSED**.

Petitioner claims Mr. Parsons also had a conflict of interest by the fact he was actively engaged in a financial relationship with the prosecuting attorney, Charles Buck Ramsey. The state claims the issue regarding Mr. Parson's conflict due to an active financial relationship with the prosecuting attorney is procedurally defaulted.

Although, there was some testimony regarding a financial relationship between Parsons and the District Attorney, Thompson did not present this issue on his direct appeal or in his appeal of his post-conviction petition. Thompson presented this claim during his state post-conviction petition hearing.

However, he failed to raise this issue on appeal. Thompson contends he was denied the opportunity to establish the claim. However, the record does not support his claim. The following colloquy took place:

MR. PARSONS: . . . The matter which you are getting to involves financial problems that Mr. Ramsey got into.

MR. FORD: Do you recall when he got into the financial problems?

MR. PARSON: I really don't. It was back in the early '80s, late '70's or early '80s.

MR. FORD: Was it going on at the time of the Thompson trial?

MR. PRUDEN: Objection, relevance, Your Honor.

THE COURT: How is this relevant, Mr. Ford?

MR. FORD: We are going to an issue of conflict, Your Honor. I believe the proof will, show that Mr. Parsons and other people came to the financial aid of Buck Ramsey, actually helped him in the purchase of a house.

MR. PRUDEN: Your Honor, it's not in the petition.

MR. FORD: Conflict. We put "conflict" in there. Our client would raise that also but we did put the issue of conflict in there.

THE COURT: Let me ask you this questions, assuming that the facts show Mr. Parsons assisted the District Attorney General in his financial matters, how is that going to be detrimental to this petitioner? I would think that would be about the best thing you could do.

MR. FORD: Apparently at some point, the conflict was recognized by Mr. Parsons who got out [sic] client to sign a wavier [sic] waiving any objection to this conflict so apparently, it entered into the mind of Mr. Parsons and apparently, it entered into the mind of Mr. Parsons and caused him some pause. Therefore, we feel like we need to delve into it and see what, if any effect it had on his representation of this man. Apparently, it caused him enough pause to get a waiver signed.

THE COURT: Well, let's just ask him that question and get right to the heart of it. Mr. Parsons, did the fact you had apparently helped General Ramsey in some way in his financial matters enter into the trial of this case in any respect?

THE WITNESS: Not at all.

MR. FORD: You cut out about half of my questions, Judge.

THE COURT: That was my purpose.

The record shows Mr. Ford was not prevented from questioning the witness further. Mr. Ford stated that the Judge's question cut out about half of his questions but the Judge did not prevent him from asking further relevant questions. Petitioner was not denied an opportunity to establish this claim. The Judge did not prevent questioning regarding the petitioner signing the waiver or circumstances

surrounding the signing of the waiver. Accordingly, the Court finds that petitioner was provided with an opportunity to establish this claim. The Court further finds that Thompson has failed to fairly present this issue to the Tennessee Supreme Court resulting in procedural default. Thompson has not shown cause and prejudice to excuse this default. Accordingly, petitioner's claim that he was denied a full and fair hearing on his claim that counsel suffered from conflicts will be **DISMISSED.**

Claim 21: COMPETENCY TO STAND TRIAL AND AT THE TIME OF THE CRIME

Petitioner claims he was incompetent at the time of the crime and at the time of trial. The state contends and the record confirms that petitioner has failed to present this claim to the state appellate courts.

Thompson is barred from seeking review of these claims in a state court proceeding because he had the opportunity to raise the issues during the course of his direct appeal and post-conviction but failed to do so. *See Rust v. Zent,* 17 F.3d 155, 160 (6th Cir. 1994). Absent cause and prejudice, this Court cannot reach the merits of claims that have been procedurally defaulted in state court by a state prisoner in a defendant's direct criminal appeal. *Reed v. Farley,* 512 U.S. 339, 354 (1994). To establish cause Thompson must present a substantial reason to excuse the default. Thompson must also show he was actually prejudiced as a result of the claimed constitutional error. *United States v. Frady,* 456 U.S. 152, 174 (1982); *Perkins v. LeCureux*, 58 F.3d 214, 219 (6th Cir.), *cert. denied,* 516 U.S. 992 (1995).

To establish cause, Thompson must present a substantial reason to excuse the default. Thompson alleges he was denied funding for mental health and investigative experts as cause for his failure to timely raise these issues in his direct appeal, or post-conviction appeal to the Court of Criminal Appeal or to the Tennessee Supreme Court. However, the Court has previously determined that Thompson was provided with funding for mental health experts at the state trial court level and the trial court record reveals that Thompson was competent at the time of the crime and his trial. Thompson's factually unsupported claim, that the state post-conviction court's denial of his motion for funds to hire experts excuses his default, fails to provide cause to excuse his procedural default. Consequently, Thompson's claim is procedurally barred, thereby necessitating the **DISMISSAL** of this issue in his § 2254 petition.

Claim 22: INEFFECTIVE ASSISTANCE OF COUNSEL

Thompson presents twenty-two claims of ineffective assistance of counsel in his § 2254 petition. The state contends only four of the twenty-two claims have been fairly presented to the Tennessee Supreme Court. The state contends petitioner never presented eighteen of the sub-parts of his ineffective assistance of counsel claim to the Tennessee state courts for consideration and has no remedy currently available under Tennessee law to present these claims to the state courts. Therefore, respondent contends petitioner is procedurally barred from consideration of these claims in this habeas proceeding. However, it is the Court's opinion that at least portions of seven of the twenty-two claims have been fairly presented to the Tennessee Supreme Court. Thompson has not procedurally defaulted or waived the issues of ineffective

assistance of counsel on approximately seven of the twenty-two asserted factual bases, specifically portions of sub-parts 1, 2, 3, and 4, and issues 6, 7, and 9 were fairly presented to the Tennessee state courts and adjudicated on the merits. With the exception of these seven claims, Thompson has failed to exhaust all the claims to which Respondent has asserted a procedural default defense. Thompson has procedurally defaulted on the other fifteen claims which this Court will address individually.

Petitioner appealed the denial of his post-conviction petition to the Court of Criminal Appeals and claimed his state trial attorneys were ineffective for nine different reasons. *Thompson v. State,* (Addendum No. 18). Specifically, the claims Thompson made to the Tennessee Court of Criminal Appeals that are related to his first four claims of ineffective assistance in this petition, are that trial counsel were ineffective for failure to interview witnesses who could have been beneficial to him, failure to adequately investigate prior head injuries, failure to prepare and present defense witnesses, and by opening the door to damaging evidence during the penalty phase of the trial.

Thompson then appealed the denial of state post-conviction relief to the Tennessee Supreme Court by filing an application for permission to appeal, which was denied. He presented the following question regarding ineffective assistance of counsel for review:

> I. There is a need to secure settlement of important issues of law relating to the standard by which the competence of criminal attorneys is measured.

In support of this claim he argued trial counsel did not warn Ms. Arlene Calajuo of the State's ability to

cross-examine her about Thompson's military history and their decision to use her as a witness was not an informed one. Petitioner also claimed trial counsel was ineffective because at the penalty stage of the trial they used their own psychological testimony to opened [sic] the door to allow unfavorable testimony regarding Thompson's evaluation at Middle Tennessee Mental Health Center. The unfavorable testimony included evidence that Thompson was a malinger who showed no remorse and that he had been violent and disruptive at the facility, Thompson also claimed trial counsel failed to develop proof regarding his previous head injuries.

Federal courts must defer to state court factual findings, according them a presumption of correctness that the petitioner may rebut only with clear and convincing evidence. 28 U.S.C. § 2254(e)(1). This presumption only applies to underlying basic, primary, or historical facts, and not to mixed questions of facts and law. *Rickman v. Bell* 131 F.3d 1150, 1153 (6th Cir. 1997), *cert. denied,* 118 S. Ct. 1827, 140 L.Ed.2d 962 (1998); *West v. Seabold,* 73 F.3d 81, 84 (6th Cir.), *cert. denied,* 518 U.S. 1027 (1996).

Ineffective assistance of counsel in a petition for habeas corpus review presents a mixed question of law and fact. *West v. Seabold*, 73 F.3d at 84. Therefore, a state court's conclusion counsel rendered effective assistance is not a finding of fact binding on the federal court to the extent stated by 28 U.S.C. § 2254 (e)(1). Ineffectiveness is a mixed question of law and fact, not a question of basic, primary, or historical fact. State court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of 28 U.S.C. § 2254(e). However, the performance and prejudice components of the ineffectiveness inquiry, which are mixed questions of law and fact, are not entitled to the deference.

See Rickman, 131 F.3d at 1153-54. To obtain relief, Thompson must show the state court's adjudication resulted in a decision that involved an unreasonable application of clearly established Federal law as determined by the United States Supreme Court. 28 U.S.C. § 2254(d)(1).

In order to demonstrate ineffective assistance of counsel, Thompson must not only show his attorney's representation fell below the standard of competence demanded of attorneys in criminal cases, but also, there is a reasonable probability, but for the attorney's unprofessional errors, the result of the proceeding would have been different. The Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), established the criteria for determining whether a Sixth Amendment claim of ineffective assistance of counsel is meritorious.

To establish his attorney was not performing within the range of competence demanded of attorneys in criminal cases, the defendant must demonstrate the attorney's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687-88; *McMann v. Richardson*, 397 U.S. 759, 771 (1970). The *Strickland* test requires that a defendant demonstrate two essential elements: (1) counsel's performance was deficient, *i.e.*, counsel was not functioning as counsel guaranteed the defendant by the Sixth Amendment, and (2) counsel's deficient performance prejudiced the defense, *i.e.*, deprived the defendant of a fair trial rendering the outcome of the trial unreliable. *Id.* at 687-88; *McQueen v. Scroggy*, 99 F.3d 1302, 1310-11 (6th Cir. 1996), *cert. denied*, 520 U.S. 1257 (1997); *Sims v. Livesay*, 970 F.2d 1575, 1579-81 (6th Cir. 1992). *See also Flippins v. United States*, 808 F.2d 16, 17-18 (6th Cir.), *cert. denied*, 481 U.S. 1056 (1987). As the Sixth Circuit explained in *United States v. Morrow*, 977

F.2d 222, 229 (6th Cir. 1992), *cert. denied*, 508 U.S. 975 (1993): "Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won." *See also West v. Seabold*, 73 F.3d at 84. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the [ultimate] judgment." *West*, 73 F.3d at 84, *quoting Strickland*, 466 U.S. at 691, *citing Smith v. Jago*, 888 F.2d 399, 404-05 (6th Cir. 1989), *cert. denied*, 495 U.S. 961 (1990). There is a strong presumption that counsel's conduct was within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689; *Sims*, 970 F.2d at 1579-80.

"Reviewing courts focus on whether counsel's errors have undermined the reliability of and confidence that the trial was fair and just." *Austin v. Bell*, 126 F.3d 843, 847 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 1526, 140 L.Ed.2d 677 (1998), *citing Strickland*, 477 U.S. at 687; *United States v. Cronic*, 466 U.S. 648, 658 (1984); *McQueen v. Scroggy*, 99 F.3d at 1310-1311. The Count cannot indulge in hindsight, but must instead evaluate the reasonableness of counsel's performance within the context of the circumstances at the time of the alleged errors. *Strickland*, 466 U.S. at 690; *McQueen*, 99 F.3d at 1311. Trial counsel's tactical decisions are particularly difficult to attack. *McQueen*, 99 F.3d at 1311; *O'Hara v. Wigginton*, 24 F.3d 823, 828 (6th Cir. 1994). A defendant's challenge to such decisions must overcome a presumption that the challenged actions might be considered sound trial strategy. *McQueen*, 99 F.3d at 1311; *O'Hara*, 24 F.3d at 828. Effective assistance of counsel is presumed, and the Court will not generally question matters involving trial strategy. *See*

United States v. Chambers, 944 F.2d 1253, 1272 (6th Cir. 1991), *cert. denied,* 502 U.S. 1112 and 503 U.S. 989 (1992).

To establish the prejudice prong, Thompson must show that absent his attorney's errors, the result of his trial would have been different. *Lynott v. Story,* 929 F.2d 228, 232 (6th Cir. 1991). "[R]eviewing court[s] must remember that 'counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Wong v. Money,* 142 F.3d 313, 319 (6th Cir. 1998), *quoting Strickland v. Washington,* 466 U.S. at 690. The Court must make an independent judicial evaluation of counsel's performance, and determine whether counsel acted reasonably under all the circumstances. *McQueen,* 99 F.3d at 1311; *O'Hara,* 24 F.3d at 828; *Ward v. United States,* 995 F.2d 1317, 1321-22 (6th Cir. 1993); *Sims,* 970 F.2d at 1580-81.

This opinion will, deal with each sub-part *seriatim.* The state contends Thompson procedurally defaulted on sub-parts one through four, except, to the extent that subpart 3 challenges counsel's investigation and preparation of the issue of his prior head injuries which was the only issue that was specifically raised and addressed on the merits by the Tennessee appellate court. This Court will address the first four sub-parts of Mr. Thompson's ineffective of assistance of counsel claim together since they are intertwined and based on the broad allegation that trial counsel failed to investigate his background and mental heath [sic] history. The first four sub-parts of his claim of ineffective assistance of counsel consists of five pages of allegations. To the extent Thompson failed to fairly present any of the claims made in the first four sub-parts of his ineffective assistance claim to the state courts,

this Court cannot address them because he has failed to show cause to excuse his failure to present the claim in the state courts and actual prejudice. *See Gray v. Netherland,* 518 U.S. at 160-161. However, for the reasons that follow this Court finds that the state court's decision did not involve an unreasonable application of established federal law as determined by the United States Supreme Court, nor did it involve an unreasonable determination of the facts in light of the state court evidence.

This Court will address the first four sub-parts of Claim 22 together. The following are the first four sub-parts of Claim 22:

1. **Thompson claims trial counsel failed to perform a reasonable investigation of his background. Counsel at all critical stages failed to reasonably investigate Mr. Thompson's background and mental health history. Petitioner claims they would have discovered that in the years after he graduated from high school, he experienced intermittently, bizarre and delusional thought patterns. Further, they would have discovered his father had a history of severe mental illness.**

2. **Petitioner claims counsel was ineffective for failing to fully investigate and present relevant evidence of his mental health history and to secure adequate expert assistance to defend petitioner, including psychologists, neuropsychological and or neurological experts to statutory mitigating factors under Tennessee law. Petitioner contends he suffered from substantial mental disorders and demonstrable physical brain damage**

which made him unable to conform his behavior to the law.

3. **Counsel failed to discover available evidence of mental illness caused by two serious head injuries. Counsel failed to obtain medical and other important records for the purpose of presenting evidence in mitigation. Experts recently obtained by Petitioner's present counsel have revealed that Petitioner was incompetent under Tennessee law at the time of the crime and throughout court proceedings. Petitioner suffered, and continues to suffer from schizophrenia, delusional thought processes, and an inability to control his actions secondary to frontal lobe organicity.**

4. **Counsel failed to investigate and challenge Petitioner's competency to stand trial as well as his competency at the time of the offense, Testing conducted at MTMHI was unreliable and trial counsel were ineffective in failing to challenge the results from MTMHI.**

The record shows that trial counsel conducted an extensive investigation of Thompson's background and childhood. Although trial counsel were informed of Thompson's alleged head injuries and researched the subject, it does not appear they obtained the medical records showing Thompson was treated for two head injuries. However, Thompson has failed to submit any medical records or proof to this Court that he actually sustained these alleged head injuries or that they resulted in any permanent damage. Thompson claims trial counsel failed to discover his father had a history of severe mental illness. However,

Thompson does not make any showing that failure to discover his father's history of severe mental illness prejudiced him in any way.

Mr. Parsons, one of petitioner's trial counsel, testified that during his interviews with the family members or with Thompson, he was told that Thompson suffered a head injury from a car wreck when he was young, and suffered a head injury as a result of an assault in the military. In addition, Thompson's trial counsel researched closed head injuries but since neither psychological examination revealed any mental illness or mitigating evidence, they made the strategic decision to present Thompson in the most positive light possible. (Addendum 12B, p. 102).

The trial judge found Thompson's trial counsel adequately investigated his background and prior medical history. The trial judge also found Thompson's post-conviction counsel did not present any proof of mental problems on the part of Thompson that would have been a defense to the charge, or that would constitute a shield against execution. The trial judge found trial counsel did not seek expert and investigative assistance regarding alleged head injuries to Thompson during his youth, or testimony as to Thompson's incompetency at the time of his confession because the facts and circumstances did not indicate the necessity for such action. The Tennessee Court of Criminal Appeals concluded Thompson failed to establish that the head injuries had any effect upon his mental stability at the time of the murder or that any type of psychological impairment in general may have existed which would have been mitigating evidence. The state court concluded Thompson failed to demonstrate any prejudice from the failure of trial counsel to further

investigate the head injuries and the evidence did not preponderate against the trial court's findings of effective assistance of counsel. (Addendum No. 18, *Thompson v. State,* C.C.A. No. 01C01-9506-CC-00180, pp. 12-14). The Tennessee Court of Criminal Appeals further found the decision not to further pursue the head injuries was reasonable strategy:

> Trial counsel's decision to emphasize the petitioner's positive qualities rather than to suggest brain damage, while unsuccessful, was based upon adequate investigation. "[T]he fact that a particular strategy or tactic failed or even hurt the defense does not, alone, support a claim of ineffective assistance." *Cooper [v. State],* 847 S.W.2d [521] at 528 [Tenn. Crim. App.1992]. Deference must be given to an informed trial strategy. This court must refrain from second-guessing trial counsel's decision to emphasize the petitioner's positive attributes rather than possible brain damage. Because two experts did not detect brain damage, counsel cannot be faulted for discarding a strategy that could not be supported by a medical opinion.

(Addendum No. 18, *Thompson v. State,* C.C.A. No. 01C01-9506-CC-00180, pp. 13-15),

The record shows there were medical experts who evaluated Thompson and they found no substantial mental disorders nor physical brain damage. Specifically, the team at Central State concluded there was no organicity (brain damage) and Dr. Copple found no indication of brain damage. (Addendum No. 12 B, p. 189). Upon motion of Thompson's trial counsel, Thompson was sent to the Middle Tennessee Mental Health Institute for a forensic mental evaluation prior to trial. (Addendum No. 12 B, pp.

33, 69). Trial counsel, Mr. Parsons and Mr. Richardson, also hired Dr. Copple to testify Thompson had some positive characteristics and had abilities that would be beneficial to society wherever he was because there was virtually no likelihood that another psychiatrist could find mental illness. (Addendum No. 12 B, p. 112). Mr. Parsons acknowledged that once the defense introduced positive evidence about Thompson he knew the state would have the opportunity to introduce negative evidence about Thompson and the only way to prevent that situation would have been to present no evidence during the punishment phase. (Addendum No. 12 B, p. 128). Therefore, to ensure that nothing detrimental came to light, trial counsel would have had to keep Dr. Copple off the witness stand, thereby preventing the jury from hearing any expert proof about Thompson.

Dr. Copple, the clinical psychologist hired by the defense, testified on Thompson's behalf during the penalty phase of his state jury trial. (Addendum. 1 H, pp. 112-143; Addendum 1 I, pp. 2-98). Dr. Copple spent approximately seven hours with Thompson, interviewing and testing him. In addition. Dr. Copple listened to the trial testimony of the people who testified for both sides and spent approximately forty minutes with Thompson during the trial, (Addendum 1 H, p. 127). Although Dr. Copple testified Thompson's arithmetic level was that of a good strong seventh grader and his reading level was a high sixth grade level, he testified Thompson had the ability to succeed at the training offered at an average community college. (Addendum 1 H, p. 130). Dr. Copple further testified Thompson had been successful at completing some college work. On a standard test of reasoning, Thompson scored in about the 64th percentile of high

school graduates, which means that 36 percent of the high school senior males would score higher and 64% would score below him. (Addendum 1 H, p. 133).

Dr. Copple testified Thompson is a sensitive, caring person, who has "this nurturance need to the extreme." (Addendum 1 I, p. 21). Dr. Copple testified he consistently saw strong remorse in Thompson. (Addendum 1 I, p. 31).

When Mr. Richardson was asked if it was true that he did all he could to develop evidence of brain damage, he responded,

> Did try to hire a psychiatrist but that was not successful and it was, you know, it was the type thing it was a theory as to whether to go with his good character and reservoir of moral upbringing, a man with a great deal of ability that could be used in the penitentiary and a life sentencing. I doubt if there will ever be another man on death row that had as good a background as he did. I don't know of any, and then the question as to whether to mix into that or try to accentuate some brain damage that we hadn't been able to spot, but at the same time, probably with some more digging may could have and then give the jury the idea that this man, if he ever gets out of prison with some brain damage, he will kill . . . somebody else, that is kind of counter productive. We went with one strategy and probably if we had to do it over again, would go with the other strategy because that one didn't work.

(Addendum No. 12 B, pp. 193-194).

The record shows Thompson's mental health was investigated and he received adequate expert assistance to attempt to establish valid mitigating factors. The mental

health experts were aware of his behavior and the experts did not find any brain damage and found Thompson was competent, Counsel was aware of Thompson's inappropriate behavior which occurred while he was in the Navy but they made the strategic decision not to introduce that evidence. However, some of the testimony included the problems he had while in the Navy and much of that information was introduced to the jury.

Mr. Parsons testified he and others working on the defense team traveled to Molena, Georgia, and Zebulon, Georgia, and interviewed petitioner's family members, neighbors, teachers, and a preacher. Mr. Parsons testified they obtained all they could of Thompson's military records.

Mr. Parsons testified that based on the overwhelming evidence, they did not think they had a chance of winning the guilt phase. However, rather than enter a plea of not guilty, they chose not to have Mr. Thompson enter any plea for strategic reasons. They wanted the state to go through the guilt phase and put all the proof on and let it settle before going into the punishment phase. They did not want all the proof entered during the punishment phase where it would be fresh to the jury. (Addendum 12 B, pp. 109-110). Mr. Parsons testified trial counsel acknowledged the terrible crime and that the proof showed overwhelmingly that petitioner committed the crime. Trial counsel concluded all they could hope for was that Thompson would receive a life sentence, so they developed a strategy to show the jury that petitioner had "social worth," (Addendum 12 B, p. 110). Mr. Parsons testified that since they could not mitigate the crime, they chose to introduce mitigating evidence at the penalty phase of petitioner's worth as an individual. They attempted to

show petitioner's skills and abilities and that he could be productive to society and in prison.

Trial counsel developed this strategy after receiving the results of a mental evaluation they sought at Central State. Mr. Parsons requested a competency evaluation of Thompson at Central State which resulted in no finding of mental illness, mental defect, nor insanity. (Addendum 12 B, pp. 74, 111). Trial counsel did not want to focus on the fact Thompson had been involved in fights in the military or any violence in his background. Mr. Parsons felt any negative evidence about Thompson should be introduced by the prosecution. (Addendum 12 B, p. 74). Therefore, during the penalty phase, they put on witnesses who testified about petitioner's positive traits. (Addendum 12 B, pp. 37-138). Petitioner's ex-girlfriend who met him after he graduated from high school, was one of the witnesses who testified during the penalty phase of his trial. She testified about their relationship, Thompson receiving stitches in his head after being hit in the head with a crow bar, and generally about Thompson's life during the time she knew him.

In his appeal to the Tennessee Criminal Court of Appeals, petitioner alleged ineffective assistance of counsel for failing to interview witnesses who could have been beneficial to this case, especially during the penalty phase. Specifically, Thompson contended counsel failed to interview his step-father, his attorney in the military, the mother of his co-defendant, a witness who worked with the petitioner after his head injuries, a woman who lived in the residence where the arrest was made, and an employee at the Middle Tennessee Mental Health Institute. The Court of Criminal Appeals of Tennessee observed that Thompson's brief suggested that these witnesses could

have been useful to show head injuries might have contributed to his commission of the offenses. The Tennessee Court concluded that it could not speculate upon the usefulness of the witnesses without the information those witnesses might have provided. The Tennessee Criminal Court of Appeals found that since none of the witnesses testified, Thompson failed to show prejudice. (Addendum No. 18, *Thompson v. State,* C.C.A. No. 01C01-9506-CC-00180).

In the case before this Court, petitioner failed to submit affidavits from the witnesses he alleges would have testified about "petitioner's bizarre behavior." Thompson has failed to provide any significant probative evidence which would make it necessary for this Court to resolve a factual dispute. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Bailey v. Floyd County Bd. Of Educ.*, 106 F.3d 135, 140 (6th Cir. 1997). Hearsay evidence is not considered on a motion for summary judgment. *Hartsel v. Keys*, 87 F.3d 795, 799 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 683 (1997). Furthermore, trial counsel testified their strategy was to keep out testimony of Thompson's previous violent behavior and show the jury he had some positive qualities. The testimony petitioner contends was not introduced was not the result of ineffective assistance of counsel, but legitimate trial strategy. Although petitioner contends his co-defendant, Joanne McNamara, recalled that while they were waiting to receive money which was being wired "[s]uddenly and without warning or reason, Greg 'snapped' and the events of the crime followed[,]" Thompson does not allege she would have testified for him.

Thompson contends his ex-girlfriend, Arlene Cajulao could have testified about several instances when he "snapped," but because she was not informed about the

nature of the penalty phase only testified about things she felt would help petitioner. First, this Court notes trial counsel and the prosecutor asked the questions, so Ms. Cajulao's testimony was in response to the questions counsel chose to ask. Furthermore, as previously stated, trial counsel's strategy was to present Thompson's positive qualities and behaviors. However, the Court notes Ms. Cajulao did testify about incidents of inappropriate behavior exhibited by Thompson including the fact Thompson was kicked out of the Navy and began demonstrating unusual behavior. She testified as follows:

> Q: From the standpoint of his personal security and safety, did he start demonstrating any unusual behavior after that?
>
> A: Yeah. He would get very paranoid. When we lived together, we had a fern tree growing on the side of the house; and he was constantly chopping the back side of it down. He would tell me when I came home to make sure nobody was standing behind there that might hurt me. If we heard noises in the evening, I would get up and find him walking around the house, thinking somebody might be there. He got very paranoid after that.

(Addendum No. 1 H, Transcript Vol. 18, pp. 55-57).

Ms. Cajulao also testified Thompson was discharged from the Navy. One of the incidents that led to the discharge was Thompson's failure to obey an order of a higher ranking officer. Ms. Cajulao testified that when the officer tapped Thompson on the back while he was drinking water, Thompson turned around and pushed him and dislocated the officer's shoulder. (Addendum No. 1 H,

Transcript Vol. 18, p. 57). Upon cross examination she admitted she knew Thompson was found guilty of wrongfully picking up and throwing the officer to the asphalt deck and breaking his collarbone. (Addendum No. I H, Transcript Vol. 18, pp. 87-88). She further testified on cross examination that she was aware he was found guilty of unlawfully striking a Navy Airman on the chest, and was also found guilty of unlawfully threatening to strike an officer on the head with a torque wrench extension bar. (Addendum No. 1 H, Transcript Vol. 18, pp. 89-90). Additionally, Thompson was found guilty of assault with a deadly weapon when he grabbed a five-inch steak knife and threatened to cut his roommates if they turned the lights on. (Addendum No. 1 H, Transcript Vol. 18, p. 92).

Dr. Copple administered the MMPI to Thompson and testified it did not show Thompson was "crazy." (Addendum 1 I, p. 59). He testified neither he nor Dr. Watson found Thompson to be abnormal or suffering from a mental illness. (Addendum 1 I, p. 58). Dr. Watson found that Thompson malingered schizophrenia and suffered from adult antisocial behavior at the Middle Tennessee Mental Health Institute. (Addendum 1 I, p. 58-61). Adult antisocial behavior was described as behavior that was previously identified as sociopathic. Antisocial behavior includes the inability to sustain a consistent social behavior, lack of conscience or guilt, unrealistically optimistic, and threatening suicide with little likelihood of following through. (Addendum 1 I, pp. 61-63).

Dr. Watson was the clinical psychologist at Middle Tennessee Mental Health Institute involved in Thompson's evaluation. Dr. Watson's deposition was introduced as rebuttal testimony by the state. (Addendum 1 I, p. 144-180). While in the Forensic Services Division at Middle

Tennessee Mental Health Institute Thompson received a medical exam which was a physical, laboratory analysis of urine and blood and serology for venereal disease, chest X-ray, and electroencephalogram. Thompson also received a psychological evaluation and a psychiatric examination. Dr. Watson testified he talked with Thompson on three or four occasions for a total of approximately one and a half hours. Dr. Watson testified Thompson's full-scale I.Q. was 92, which places him in the lower average range intellectually, and indicates there is no intellectual impairment. Thompson's reading level was better than 70% of the test population. (Addendum No. 1 I, pp. 144-151). Dr. Watson testified they primarily gave this test for the purpose of assessing his reading ability because Thompson claimed he could not read or write. (Addendum 1 I, p. 151).

Dr. Watson testified Thompson was given the Bender Visual-Motor Gestalt Test which was a general assessment for brain damage. This test is a drawing test and the professionals are looking for evidence of organicity, which is brain damage. Dr. Watson testified there was a history in his background of a concussion at the age of 16 with reported hospitalizations, and being hit over the head with a hammer while in the military, but they did not have the records. Dr. Watson testified the Bender showed a few errors, but no real evidence of organicity or brain damage. However, to further test this, the Bender Interference Procedure was performed and what they expected was the results of that procedure would be worse than the results obtained on the original test if the person is suffering from organicity or brain damage. However, since they found less errors on the Bender Interference Procedure than on the original, that further strengthened their belief that Thompson did not suffer from any serious organicity.

(Addendum 1 I, pp. 152-153). The lack of brain damage was also seen on the electroencephalogram the interpretation of which was a normal EEG. (Addendum 1 I, p. 156). Dr. Watson testified Thompson appeared to endorse all the psychotic symptoms that he could on the MMPI which drove the score almost off the graph. Therefore, they did not believe there was any clinical evidence of psychosis and found the test result indicated malingering mental illness. (Addendum 1 I, p. 153).

Dr. Watson testified Thompson claimed to hear voices but he only made that claim one time and none of the tests supported his claim of hearing voices. (Addendum 1 I, p. 155). The diagnosis on Thompson was Axis 1, Adult Antisocial Behavior, which is not a mental illness. (Addendum 1 I, p. 162). Dr. Watson further testified he and his colleagues concluded, based upon their examinations and discussions with Thompson, that he showed very little or no emotion or expressions of empathy, and Dr. Watson saw no evidence of remorse. (Addendum 1 I, pp. 164-165). Dr. Watson also testified they found Thompson resisted authority and does what he wants to do. Dr. Watson further testified that Thompson was not suffering from a mental illness which made him harmful to himself or to others but that did not mean that he is not harmful to himself or to others. (Addendum 1 I, p. 169).

During Thompson's state post-conviction hearing, Dr. Gillian Blair, a clinical psychologist who received her Ph. D. from Vanderbilt in 1988, testified on Thompson's behalf. Dr. Blair first became involved in the Thompson case in 1990. (Addendum. No. 12 B, pp. 199-203). Dr. Blair reviewed Mr. Thompson's institutional records, records from the assessment at Middle Tennessee Mental Health Institute, Forensic Services Division, and some records

which were brief and sketchy regarding Thompson's childhood. She reviewed the social history written by the social worker at the Middle Tennessee Mental Health Institute which were mainly based on a written questionnaire completed by Thompson's grandmother. (Addendum No. 12 B, p. 704). Dr. Blair interviewed Thompson on several occasions in March and April of 1992 at Riverbend Maximum Security Institution. (Addendum No. 12 B, p. 206). During those interviews she administered "a basic psychological battery of tests with some additional neuropsych, neuropsychological tests because of the history of head injuries that Mr. Thompson had received and that were well documented in his medical record." (Addendum No. 12 B, p. 206). She was unable to give an opinion as to his present condition at the post-conviction hearing because she had not spoken to him in three years. Dr. Blair reviewed some of Thompson's medical records for 1993 and 1994 from Riverbend prior to testifying at Thompson's post-conviction hearing on March 29, 1995.

Dr. Blair testified that prior to meeting Thompson, her opinion, based on the medical records from Riverbend, was that Thompson had shown a deteriorating mental status and became psychotic. When Dr. Blair saw Thompson in 1992 he was heavily medicated, and she testified he was on Lithium to treat the mood swings, the bipolar disorder; on Haldol, which is an anti-psychotic medication to treat the psychotic symptoms; on Cogentin to minimize the side effects of the anti-psychotic medication; and Ativan to reduce agitation. (Addendum No. 12 B, p. 211). However, review of the 1994 records revealed Thompson was receiving Meilaril, an anti-psychotic medication but on November 25, 1994, he requested he be allowed to discontinue the medication and against medical advice, he

discontinued the medication, and as of January 5 or 15, 1995, he was still off the medication. (Addendum No. 12 B, p. 212). She testified that throughout the Riverbend records "there was some question as to whether [Thompson] accurately fit the diagnostic criteria for [schizoaffective] disorder or schizophrenia or a bipolar disorder, all of which usually begin in early adulthood." (Addendum No. 12 B, pp. 214-215). Dr. Blair stated she could not give any definite opinion as to his present condition nor did she have an opinion about his diagnostic status in 1985. (Addendum No. 12 B, pp. 219-220).

Dr. Blair testified she found similar results to the results found in 1985 and in other areas her results were not consistent with the 1985 results. (Addendum No. 12 B, p. 225). When asked if Thompson's educational achievements and test scores between 100 and 80 percent, were consistent or inconsistent with the person being psychotic, Dr. Blair testified the achievements and scores were consistent with someone who is stable through the administration of medication or through the absence of any psychosis. (Addendum 12 B, pp. 243-247). Dr. Blair stated "I think we have well established that for at least, or more than 12 months prior to the end of November 1994, that Thompson had been stable, that be had been in remission of all of his psychotic symptoms." (Addendum 12 B, pp. 246-247). When asked if she could state with a reasonable degree of scientific certainty whether Thompson was psychotic, schizophrenic, or had a bipolar disorder as he sat in court on March 29, 1995, Dr. Blair responded that to make a diagnosis she would need more than to just look at him, but he looked as if he was stable at that time. (Addendum No. 12 B, p. 248).

Petitioner claims experts recently obtained by him have revealed that he was incompetent under Tennessee law at the time of the crime and throughout his court proceedings. Petitioner has failed to state the name of the expert and failed to provide the proof of these revelations. The Court has read the deposition of Dr. Crown. (Court File No. 11, Exhibit 1) but was unable to located [sic] his opinion that Thompson was incompetent at the time of the crime and throughout his court proceedings. As a matter of fact, Dr. Crown stated he was not asked to render any determination about whether or not Thompson was competent during his state jury trial. (Court File No. 91, Exhibit 1, pp. 7-9). Dr. Crown stated he was only asked to make a competency determination at the time he met Mr. Thompson on June 12, 1998. After meeting with Thompson for two and a half to three hours, which consisted of taking a brief history for twenty-five to thirty minutes and the remainder of the time was spent administering tests, it was his opinion that Thompson was competent on June 12, 1998. (Court File No. 91, Exhibit 1, p. 7-47).

Dr. Crown did testify Thompson had a significant auditory processing deficit which means he is easily distracted by external auditory stimuli. (Court File No. 91, Exhibit 1, p. 20). He further testified that some of the test results led him to conclude there was some sort of organic brain damage. However, he is not able to make any assessment of the severity of the damage nor does he intend to make such an evaluation. (Court File No, 91, Exhibit 1, pp. 24-28). Dr. Crown, believes this organicity is secondary to a thought disorder which he refers to as a schizoaffective disorder-bipolar subtype with organic components. Dr. Crown bases his conclusion on the reports of the people who have treated Thompson for the last fourteen

years. (Court File No. 91, Exhibit, 1, pp. 31-32). Dr. Crown did not administer a specific malingering test to Thompson. (Court File No. 91, Exhibit, 1, p. 35).

Respondent hired Dr. Blau to rebut Dr. Crown's testimony. Portions of Dr. Blau's testimony have been filed with the Court. Dr. Blau testified he did not observe or see any indications of organic brain damage on the test he administered. Dr. Blau found Thompson's responses during testing were rational and appropriate. (Court File No. 89, Attachment C, pp. 31, 47-48).

Thompson has failed to provide any significant probative evidence which would make it necessary for this Court to resolve a factual dispute. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Bailey v. Floyd County Bd. Of Educ.*, 106 F.3d 135, 140 (6th Cir. 1997). Hearsay evidence is not considered on a motion for summary judgment. *Hartsel v. Keys*, 87 F.3d 795, 799 (6th Cir 1996), *cert. denied,* 117 S. Ct. 683 (1997). Thompson has not provided this Court with anything other than factually unsupported allegations that he was incompetent at the time he committed the crime and at the time of his jury trial. Nor has Thompson provided this Court with any significant probative evidence that Thompson was suffering from a significant mental disease that should have been presented to the jury during the punishment phase as mitigation evidence.

Petitioner had two different psychological evaluations and both resulted in findings of competency at the time of the crime and at the time of trial. Additionally, the record shows that trial counsel did reasonably investigate Thompson's background and mental health history.

Accordingly, to the extent Thompson did not procedurally default on sub-claims one through four of Claim 22

– Ineffective Assistance of Counsel, this Court finds petitioner has failed to show that the state court's decision involved an unreasonable application of established federal law as determined by the United States Supreme Court, nor did it involve an unreasonable determination of the facts in light of the state court evidence. Accordingly, subpart numbers one though four of Claim 22 regarding counsel's failure to investigate are without merit and will be **DISMISSED.**

In sub-part five of Claim 22 – Ineffective Assistance of Counsel, Thompson alleges counsel failed to impeach the credibility of Thompson's confession by presenting evidence to establish that Thompson's description of the murder was inconsistent with the physical facts and the confession was taken in violation of his Fourth, Fifth, Sixth, and Fourteenth Amendment rights. In sub-part six of his ineffective assistance of counsel claim, Thompson contends trial counsel failed to object to clearly inadmissible and prejudicial hearsay regarding whether Thompson, after first invoking his right to counsel, initiated a conversation with a Georgia prosecuting attorney. The respondent contends Thompson procedurally defaulted on issue five and has failed to demonstrate the state court's decision on sub-part six was contrary to or was the result of an unreasonable application of established federal law as determined by the United States Supreme Court, or involved an unreasonable determination of the facts in light of the evidence.

Thompson has procedurally defaulted on sub-part five, and since he has failed to show cause and prejudice for his procedural default, this Court cannot address this issue and it will be **DISMISSED**. Sub-part six addresses

the suppression of his confession which has been properly presented to the highest Tennessee state court.

Thompson claims trial counsel was ineffective for failing to object to inadmissible prejudicial hearsay that Thompson initiated a conversation with a Georgia prosecuting attorney after he invoked his right to counsel. (Court File No. 17, Claim 22, p. 25). Although Thompson fails to set forth the facts supporting this claim as required by Rule 2 of the RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS, and he fails to identify the "inadmissible, prejudicial hearsay," the Court presumes he is claiming trial counsel was ineffective for failing to object to TBI Agent Jerry Eubanks' testimony at the suppression hearing.

Thompson raised the issue of Eubank's testimony during his state post-conviction proceedings. During his state post-conviction proceedings, Thompson specifically claimed counsel was ineffective for failing to object to the following testimony of TBI Agent Jerry Eubanks: "I remember Detective Graham coming out of the interview room and telling the Attorney General that Gregory Thompson wanted to talk with him." (Addendum No. 1 B, p. 92); *also see State v. Thompson*, 958 S.W.2d 156, 162 (Tenn. Crim. App. 1997). The Tennessee Court of Criminal Appeals found that Thompson failed to demonstrate any prejudice from the failure to object to the hearsay. Specifically, the Court found that Thompson testified during the suppression hearing that he wanted to talk with the District Attorney again. *Id. at* 162-163).

Prior to trial, defense counsel for Thompson filed a motion to suppress statements he made to law enforcement officials. (Addendum No. 1 B, p. 12). When asked on

cross-examination, "[f]inally you told Detective Graham . . . that you wanted to see that lawyer [the District Attorney] again[,]" Thompson responded "[y]es." *Id.* at 162, (Addendum No. 1 B, p. 46). Later in the hearing during cross examination the following colloquy takes place:

> Q: . . . Then you tell Graham that you want to talk to him (the District Attorney) again, didn't you?
>
> A: Yes sir, after he came in.
>
> Q: You told somebody, at least, I say Graham – the man who just walked in the courtroom – you told him that you wanted to talk to that District Attorney?
>
> A: Yes.
>
> Q: And that's when he came back in and you drew him a map.
>
> A: Yes sir.

(Addendum No. 1 B, p. 53-54).

The Tennessee Court of Criminal Appeals found that Thompson acknowledged he reinitiated contact with the District Attorney and the hearsay evidence at issue was not necessary to establish that fact. Thus, they found there was no showing of prejudice.

This Court has reviewed the transcripts and finds Thompson has failed to show any prejudice from counsel's failure to object to this hearsay. Thompson was the first to testify at the suppression hearing and Thompson testified he told Graham he wanted to talk with the District Attorney again. (Addendum No. 1 B, pp. 53-54). This Court agrees with the state court's determination of the facts in

light of the evidence. Further, there is nothing in the record to indicate that the state court's decision involved an unreasonable application of established federal law as determined by the United States Supreme Court. Accordingly, sub-part six of Claim 22 is without merit and will be **DISMISSED.**

Sub-part seven is an allegation that counsel failed to properly prepare the defense witnesses and failed to properly cross-examine the state's witnesses. Specifically, Thompson claims trial counsel's failure to properly examine Dr. Watson, Arlene Cajulao, and Nora Jean was due to lack of resources and due to defense counsel being uninformed. Thompson does not set forth the facts to support this claim nor does he specify what trial counsel should have done to remedy the alleged inadequacy. This Court is unable to determine what Thompson's specific complaint is.

During his state post-conviction proceedings Thompson claimed trial counsel failed to properly prepare Arlene Cajulao to testify. The state contends only the claim as to Ms. Cajulao is properly before this Court and Thompson procedurally defaulted on the remainder of the claim because he failed to present it to the Tennessee Supreme Court. The Court agrees the issue of inadequate preparation as to other witnesses was not presented to the state courts. The Court presumes Thompson is alleging that if trial counsel had spent more time with the witness, his negative military history could have been avoided as he alleged in his state post-conviction proceeding. The Tennessee Court of Criminal Appeals found that trial counsel realized cross-examination of Ms. Cajulao might be risky but they also realized their only other option would have been to present no mitigating evidence at all.

The Court has reviewed the transcripts and finds that defense counsel was aware of the possible dangers inherent in the cross-examination of Ms. Cajulao when they made the tactical decision to present her positive testimony anyway. The strategy was based on adequate preparations and Thompson has not overcome the presumption of sound trial strategy. This Court agrees with the Tennessee Court of Criminal Appeals finding that "trial counsel had little choice but to present as much mitigating evidence as possible even though there were risks inherent in that strategy." *Thompson v. State,* 958 S.W.2d at 165. Thompson does not allege nor does the record show that additional preparation time with the witness would have prevented the state from effectively cross-examining her about Thompson's military background. Thompson has not shown that trial counsel was ineffective for failing to properly prepare Ms. Cajulao.

Thompson claims that trial counsel failed to properly examine other witnesses. He fails to set forth the facts supporting this claim as required by Rule 2 of the RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS, and this Court does not find the remaining part of this issue addressed by any of the state courts. Accordingly, the remaining portion of this claim will be **DISMISSED.**

In sub-part eight, Thompson claims counsel failed to research and discover the alleged devastating consequences of counsel's agreement with the prosecution to read a deposition into the record and to forsake his confrontation clause rights as to psychiatric expert testimony. Thompson has failed to allege prejudice or provide facts supporting this claim. On his appeal of his state post-conviction petition to the Tennessee Court of Criminal

Appeals, Thompson claimed counsel was ineffective by allowing a deposition to be used rather than requiring the state witness, Dr. Robert Glenn Watson, to appear at the penalty phase of the trial. However, when he filed his Application for Permission to appeal to the Tennessee Supreme Court he failed to appeal this issue. The state contends Thompson procedurally defaulted this issue and this Court agrees. Thompson has not submitted any evidence to show cause and prejudice to excuse this default. Accordingly, subpart 8 will be **DISMISSED** due to Thompson's failure to raise it in the highest Tennessee court.

In subpart nine, Thompson claims "[c]ounsel failed to research and discover the effect of offering the testimony of Dr. Copple on the scope of the State's rebuttal." (Court File No. 17, p. 25). When Thompson appealed the denial of his state post-conviction petition to the Tennessee Court of Criminal Appeals he claimed trial counsel was ineffective when they opened the door to devastating evidence by asking Dr. Copple about Thompson's good qualities. When Thompson appealed to the Tennessee Supreme Court he claimed trial counsel did not make an informed tactical decision to use or not use their own psychological testimony because trial counsel did not know that the records of the psychological exam at Middle Tennessee Mental Health Center could be used against Thompson at the penalty phase to rebut their psychological testimony. (Addendum No. 18, p. 13). The state contends the petitioner has failed to demonstrate that the state courts decision was an unreasonable application of established federal law as determined by the United States Supreme Court, or that it involved an unreasonable determination of the facts in light of the state court evidence.

Thompson claims trial counsel failed to research and discover that by offering the testimony of Dr. Copple they opened the door which allowed the state to present damaging evidence in rebuttal but he does not show any prejudice. This issue was raised in Thompson's state post-conviction petition and presented to the Tennessee Court of Criminal Appeals and his Rule 11 Application for Permission to Appeal to the Tennessee Supreme Court.

Thompson does not claim the state court's decision was an 'unreasonable application of established federal law as determined by the United States Supreme Court, or that it involved an unreasonable determination of the facts in light of the state court evidence. A review of the record shows neither attorney expected the state to be able to use the information acquired by MTMHI. However, Mr. Parsons acknowledged he knew that positive testimony by Dr, Copple would open the door for the state to present negative information. It was trial counsel's strategy to emphasize positive attributes of the petitioner and that he could lead a productive life in prison. If any witness testified about the petitioner's good character, the state would have been entitled to rebuttal. The only other option would have been to present no proof at all. Trial counsel chose a strategy and based on the test results and Thompson's history this Court cannot find that trial counsel's decision to pursue this strategy was ineffective assistance of counsel. Moreover, the jury found three aggravating factors, and this Court cannot conclude that the outcome would have been different if the jury had not heard the evidence regarding Thompson's testing at MTMHI.

Thompson has not shown that the state court's decision was an unreasonable application of established federal law as determined by the United States Supreme

Court, or that it involved an unreasonable determination of the facts in light of the state court evidence. Accordingly, subpart nine will be **DISMISSED** as meritless.

In subpart ten, Thompson claims trial counsel failed to consult with him at crucial stages during all prior proceedings. Thompson has failed to identify the crucial stages when counsel failed to consult with him. Thompson has done nothing more than make a boilerplate complaint with no supporting cases or relevant facts giving rise to this claim. The state claims petitioner failed to present this [sic] claims to the state appellate courts. Not only has Thompson failed to set forth the facts supporting this claim as required by Rule 2 of the RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS, Thompson has failed to identify the crucial stages when counsel failed to consult with him. Moreover, Thompson has procedurally default [sic] this claim because he failed to raise the issue in state court or show cause and prejudice for his procedural default. Accordingly, subpart ten will be **DISMISSED** for failing to set forth facts supporting this claim and on the grounds of procedural default.

In subpart eleven, Thompson claims "[c]ounsel failed to adequately object to the prosecutor's improper, inflammatory, prejudicial, inappropriate and misleading or inaccurate statements concerning the law, the evidence or the petitioner during voir dire, opening, direct examination, cross examination, closing, and rebuttal closing at the guilt phase of petitioner's trial, and during opening, direct examination, cross examination, closing and rebuttal closing at the penalty phase of petitioner's trial, as well as during out of court communications between counsel." The state claims subpart eleven is not sufficiently pled

because Thompson failed to set forth the facts supporting this claim as required by Rule 2 of the RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS. Petitioner fails to offer anything more than boilerplate language alleging ineffective assistance of trial counsel for failing to object to prosecutor's statements. There is not a discussion of the relevant facts giving rise to this claim, nor are there any citations to federal or state cases, much less an explanation of their respective holdings. Furthermore, Thompson failed to present this issue to the Tennessee state courts. Thompson has procedurally defaulted this claim because he failed to raise the issue in state court, or he has failed to show cause and prejudice for his procedural default. Accordingly, subpart eleven will be **DISMISSED** for failing to set forth facts supporting this claim and on the grounds of procedural default.

Thompson next claims, in subpart twelve, counsel was ineffective for failing to immediately advise the court of a racist comment made by Assistant District Attorney General Luna. The state claims Thompson procedurally defaulted on this claim. Although, the Tennessee Court of Criminal Appeals addressed the issue of whether counsel was ineffective for failing to question the assistant district attorney at the motion for new trial about racist remarks, Thompson did not raise this issue in the Tennessee Supreme Court. The result is procedural default. Additionally, Thompson has not shown any prejudice due to this alleged failure. Accordingly, subpart twelve will be **DISMISSED** due to Thompson's procedural default and failure to show cause and prejudice for his default.

Subpart thirteen consists of a claim that counsel failed to prepare adequately for either the guilt phase or the penalty phase of trial and to develop and present to

the jury a coherent theory of defense at either phase. Thompson claims trial counsel failed to understand the significance of the "negative" information about his behavior and failed to make a reasonable strategic decision because counsel was not fully informed of Thompson's mental health. The state contends Thompson procedurally defaulted on this issue and failed to show cause and prejudice. Thompson failed to fairly present this claim in state court. In his post conviction appeal to the Tennessee Supreme Court, Thompson claimed trial counsel did not make informed strategic decisions regarding introduction of certain testimony because counsel did not know the law. In the claim before this Court, Thompson claims trial counsel failed to understand the significance of certain testimony because they were not fully informed about Thompson's mental health. Thompson failed to fairly present this issue to the Tennessee Supreme Court. Thompson procedurally defaulted on this issue and has failed to show cause and prejudice for his procedural default. Accordingly, subpart thirteen will be **DISMISSED.**

In subpart fourteen, Thompson contends trial counsel lacked the experience and knowledge to effectively represent him in a death penalty case. The state contends petitioner has failed to show that the state court's decision involved an unreasonable application of established federal law as determined by the United States Supreme Court, or that it involved an unreasonable determination of the facts in light of the state court evidence. Thompson must show that counsel's lack of death penalty experience prejudiced him. Thompson does not contend and the Court does not find any statute or case which requires that counsel who represent defendants subject to the death

penalty be represented by counsel who have any specialized death penalty experience.

The Court has read the record and notes that trial counsel filed numerous motions and vigorously defended Thompson at trial. Mr. Richardson and Mr. Parsons had each actively practiced law for twenty or more years and both had trial experience with serious felony cases. They made strategic choices to represent Thompson in the most positive light possible.

The fact that Mr. Parsons had never been involved in a murder case prior to Thompson's does not rendered [sic] his assistance ineffective. Mr. Parsons testified in preparation of Thompson's trial, he traveled to Thompson's hometown of Molena, Georgia, and to another little town, Zebulon, Georgia, and interviewed family and others who knew Thompson (Addendum 12 B, p. 37). Mr. Parsons asked the witnesses if they knew anyone else who might know something about Mr. Thompson. (Addendum 12 B, p. 149). Mr. Parsons testified he was aware of two alleged head injuries and believes he wrote for the medical records but never received them. Mr. Parsons further testified he obtained all of Thompson's military records he was able to get. Mr. Parsons felt in order to make the head injuries significant or relevant, they would have needed some expert proof and they did attempt to develop that proof by having Thompson tested. They also hired their own expert Dr. Copple. Mr. Parsons testified he went to an "absolutely superb" Capital Resource Seminar which lasted several days.

Mr. Doyle Richardson, Thompson's other trial attorney, testified that about ten percent of the cases he handled were criminal. Mr. Richardson had been involved in

three or four first-degree murder cases. Mr. Richardson testified they filed every motion they could think of to file. He testified they thoroughly investigated the facts of the case to the best of their ability and in accordance with their strategy. (Addendum 12 B, p. 189). He testified they did everything they knew how to do and thought their defense was as thorough as it should have been other than not thoroughly investigating the head injury. (Addendum 12 B, p. 192).

The Tennessee Court of Criminal Appeals did not find any prejudice due to trial counsel's lack of experience in capital cases. Thompson has not shown that trial counsel were ineffective or that Thompson was prejudiced in any way. Thompson does not show that the state court's decision involved an unreasonable application of established federal law as determined by the United States Supreme Court, or that it involved an unreasonable determination of the facts in light of the state court evidence. Accordingly, subpart fourteen will be **DISMISSED** as meritless.

Subpart fifteen consists of a claim that counsel failed to challenge for cause jurors whose opinions would lead them to impose the death penalty in every case or those jurors whose views would prevent or substantially impair the performance of their duties as a juror. The state contends Thompson procedurally defaulted on this issue and failed to show cause and prejudice.

Thompson failed to set forth the facts supporting this claim as required by Rule 2 of the RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS. Petitioner fails to offer anything more than boilerplate language alleging ineffective assistance of trial

counsel for failure to challenge jurors. Thompson does not identify which jurors counsel failed to challenge. There is no discussion of the relevant facts giving rise to this claim. There are no citations to federal cases, much less an analysis of their respective holdings. Furthermore, Thompson failed to present this issue to the Tennessee state courts. Thompson has procedurally defaulted this claim because he failed to raise the issue in state court or show cause and prejudice for his procedural default. Accordingly, subpart fifteen will be **DISMISSED** for failing to set forth facts supporting this claim and on the grounds of procedural default.

Subpart sixteen claims trial counsel failed to adequately challenge for cause those jurors who by their answers showed some type of bias against the petitioner, his case, and/or class to which the petitioner belongs. The state contends Thompson procedurally defaulted on this issue and failed to show cause and prejudice. Additionally, the state claims Thompson failed to sufficiently plead this claim with the specificity required by Rule 2 of the RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS.

Thompson failed to set forth the facts supporting this claim as required by Rule 2 of the RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS. Petitioner fails to offer anything more than boilerplate language alleging ineffective assistance of trial counsel for failure to challenge jurors. Again, Thompson fails to identify the jurors who were not adequately challenged. There is no discussion of the relevant facts giving rise to this claim; and there are no citations to federal cases, much less an analysis of their respective holdings. Furthermore, Thompson failed to present this issue to the

Tennessee state courts. Thompson has procedurally defaulted this claim because he failed to raise the issue in state court or show cause and prejudice for his procedural default. Accordingly, subpart sixteen will be **DISMISSED** for failing to set forth facts supporting this claim and on the grounds of procedural default.

In subpart seventeen, petitioner claims trial counsel failed to file or adequately argue necessary motions before, during, and after trial, on direct appeal or on post-conviction. The state contends petitioner has procedurally defaulted on this claim and failed to show cause and prejudice. The state also claims Thompson has failed to sufficiently plead this claim with the specificity required by Rule 2 of the RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS.

Thompson has failed to set forth the facts supporting this claim as required by Rule 2 of the RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS. Petitioner fails to offer anything more than boilerplate language alleging ineffective assistance of trial counsel.

Thompson fails to identify the motions at issue and discuss the relevant facts giving rise to his claim. There are no citations to federal cases, much less an analysis of their respective holdings. Furthermore, Thompson did not present this issue to the Tennessee state courts. Thompson has procedurally default [sic] this claim because he failed to raise the issue in state court or show cause and prejudice for his procedural default. Accordingly, subpart seventeen will be **DISMISSED** for failing to set forth facts supporting this claim and on the grounds of procedural default.

In subpart eighteen, Thompson claims trial "[c]ounsel failed to object to jury instructions at the penalty phase which shifted the burden of proof to petitioner to show the existence of mitigating circumstances and comments in closing on the Defendant's failure to provide a defense." The state contends petitioner has procedurally defaulted on this claim and failed to show cause and prejudice.

Thompson did not present this issue to the Tennessee state courts. Thompson has procedurally default [sic] this claim because he failed to raise the issue in the highest state court or show cause and prejudice for his procedural default. Accordingly, subpart eighteen will be **DISMISSED** on the grounds of procedural default.

Thompson contends in subpart nineteen that trial counsel were ineffective because they failed to object to the jury's consideration of the impact of the crime on the victim, the victim's family, society and/or the victim's social, moral, or religious worth. The state contends petitioner has procedurally defaulted on this claim and failed to show cause and prejudice.

Thompson did not present this issue to the Tennessee state courts. Thompson has procedurally default [sic] this claim because he failed to raise the issue in the highest state court or show cause and prejudice for his procedural default. Accordingly, subpart nineteen will be **DISMISSED** on the grounds of procedural default.

In subpart twenty, Thompson claims trial counsel were ineffective for failing to have the court instruct the jury on the effect of their inability to agree on a sentence of death and/or the meaning of a life sentence or the petitioner's eligibility for any release. The state contends

petitioner has procedurally defaulted on this claim and failed to show cause and prejudice.

The United States Supreme Court recently held in *Jones v. United States*, 119 S.Ct. 2090, 2098-2100 (1999), that a defendant is not entitled to a jury instruction that the jury's failure to reach a unanimous sentencing recommendation automatically would result in a court-imposed sentence of life imprisonment without the possibility or release. Although the sentencing structure for death penalty cases was slightly different in 1985, in that life imprisonment without parole was not one of the possible sentences, the fact that the Eighth Amendment does not require the jury be instructed as to the consequences of their inability to agree renders this issue meritless. Moreover, Thompson failed to present this issue to the highest Tennessee state court. Thompson has procedurally default [sic] this claim because he failed to raise the issue in the highest state court or show cause and prejudice for his procedural default. Accordingly, subpart twenty will be **DISMISSED** on the grounds of procedural default.

Subpart twenty-one claims trial counsel failed to present evidence that Thompson could live a meaningful and productive life in prison. The state contends petitioner has procedurally defaulted on this claim and failed to show cause and prejudice.

The Court notes that Thompson earlier claimed ineffective assistance of counsel because Dr. Copple testified about positive attributes of Thompson to assist their strategy of presenting Thompson in a favorable light with worthiness and abilities to be productive in jail instead of being executed. Now Thompson claims there

was no evidence introduced to show he could live a meaningful and productive life in prison. However, this Court will not address these inaccurate allegations because Thompson failed to present this issue to the highest Tennessee Court and has failed to show cause and prejudice for his procedural default. Accordingly, subpart twenty-one will be **DISMISSED** on the grounds of procedural default.

The last claim under ineffective assistance of counsel is subpart twenty-two alleging counsel failed to properly and fully raise any or all of the claims in this petition either at trial, on direct appeal, or in post-conviction proceedings. During oral argument on the motion for summary judgment, Thompson's counsel stated "[c]laim 22 is simply a cumulative error claim, not necessarily an independent claim . . . " (Motion Transcript, p. 89). The state claims petitioner procedurally defaulted on this issue and has failed to show cause and prejudice.

Thompson failed to present this issue to the highest Tennessee Court and has failed to show cause and prejudice for his procedural default. Accordingly, subpart twenty-two will be **DISMISSED** on the grounds of procedural default.

Claim 23: STATE PROCEDURES VIOLATING EQUAL PROTECTION

Thompson claims the State of Tennessee violated his equal protection rights under the Fifth and Fourteenth Amendments to the United States Constitution in two ways. His first claim is that his rights were violated when the Tennessee courts removed the Honorable Buddy D. Perry who had been duly appointed and was removed without appropriate cause. The state contends this claim

fails to state a claim for habeas relief because it is a matter that addresses state post-conviction procedure and has nothing to do with the petitioner's conviction or sentence.

As the Court previously stated, the writ of habeas corpus is not the proper means by which a prisoner should challenge errors or deficiencies in state post-conviction proceedings because these claims address collateral matters and not the underlying state conviction giving rise to the prisoner's incarceration. *Kirby v. Dutton,* 794 F.2d 245, 247 (6th Cir. 1986). "Even where there may be some error in state post-conviction proceedings, this would not entitle appellant to federal habeas corpus relief since appellants claim here represents an attack on a proceeding collateral to detention of appellant and not on the detention itself . . . Infirmities in state habeas corpus proceedings do not constitute grounds for federal habeas relief." *Vail v. Procunier*, 747 F.2d 277 (5th Cir. 1984). Accordingly, subpart a of Claim 23 will be **DISMISSED** for failure to state a federal constitutional claim cognizable in a federal habeas proceeding.

In subpart b of Claim 23, Thompson claims the trial court erroneously appointed the foreman of the grand jury, in violation of mandatory state law, where there had been no election of the presiding judge in the 14th Judicial Circuit. The state contends the claim is procedurally defaulted because the issue was presented to the highest state court as a violation of a state statute and not as a federal constitutional issue.

Petitioner raised this issue in the Tennessee Supreme Court as an issue of state law not constitutional law. He claimed the trial court erred in failing to grant the motion

to dismiss his indictment for all the reasons set out in the pretrial motion they filed and because the statute, TENN. CODE ANN. § 16-2-509, is mandatory. (Addendum No. 2, p. 71-74). The reasons stated in the pre-trial motion were based on Tennessee statutes. "[T]he habeas petitioner must present his claim to the state courts as a federal constitutional issue – not merely as an issue arising under state law." *Prather v. Rees*, 822 F.2d 1418, 1420 (6th Cir. 1987), *quoting Koontz v. Glossa*, 731 F.2d 365, 368 (6th Cir. 1984). Thompson raised this claim in state court as a state law question and therefore, the federal constitutional violation allegedly caused by the state court's disposition of this question was not exhausted. *See Id.* at 1420; *Dougan v. Ponte*, 727 F.2d 199 (1st Cir. 1984). Thompson has procedurally defaulted on this issue and he has failed to show cause and prejudice for his default. Accordingly, this claim will be **DISMISSED** on the ground of procedural default.

Claim 24: UNCONSTITUTIONAL GUILT PHASE JURY INSTRUCTIONS

Thompson claims the jury instructions at the guilt phase violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Thompson claims the unconstitutional jury instructions include, but are not limited to, subpart a and b. The state contends Thompson raised the issue as an issue of state law and it was never raised to highest state court as a constitutional violation.

"To warrant habeas relief, the jury instructions must have been so infirm that they rendered the entire trial fundamentally unfair. An ambiguous, potentially erroneous instruction violates the Constitution only if there is a

reasonable likelihood that the jury has applied the instruction improperly." *Coe v. Bell*, 161 F.3d 320 (6th Cir. 1998), *cert. denied*, 120 S. Ct. 110 (1999), *citing Estelle v. McGuire*, 502 U.S. 62 (1991); *Austin v. Bell*, 126 F.3d 843, 846 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 1526 (1998).

To the extent Thompson is attempting to attack jury instructions other than the two specified charges, the claim is **DISMISSED** for failure to set forth the facts supporting this claim as required by Rule 2 of the RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS.

Subpart (a) claims the jury instruction on first degree murder and lesser included offenses failed to make sufficient distinctions between first and second degree murder and voluntary manslaughter and omitted many of the defenses of second degree murder. The Tennessee Supreme Court was unable to address this issue because it was presented without argument. However, the Court stated some of the issues, including this issue had no obvious merit. The Court finds Thompson did not raise this alleged constitutional violation in state court. Accordingly, this claim will be **DISMISSED** on the ground of procedural default.

Thompson claims in subpart (b) that the trial court gave an unconstitutional jury instruction when it instructed, in violation of state law, that deliberation can be formed in an instant. The state claims Thompson has failed to raise this claim as a constitutional claim to the highest Tennessee court and therefore, has procedurally defaulted. Thompson claims it was raised on state post-conviction as a federal constitutional claim and was presented to all courts. However, this Court does not find

that petitioner raised it as a federal constitutional claim state court. Even his application for permission to appeal to the Supreme Court on post-conviction addresses it in terms of state law and fails to cite any federal constitutional violation or cite any federal case law.

The petitioner failed to cite to the record directing the Court to the specific jury instruction he is challenging. The Court presumes petitioner is challenging the jury instruction requiring the state to prove beyond a reasonable doubt that "the killing was deliberate; that is, with cool purpose[.]" (Addendum 1H, p. 103); and the instruction that "[p]remeditation means that the intent to kill must have been formed prior to the act itself. Such intent or design to kill may be conceived and deliberately formed in an instant. It is not necessary that the purpose to kill preexists in the mind of the accused for any definite period or time. It is sufficient that it preceded the act, however, short the interval. (Addendum 1H. p.105).

This attempt to create a constitutional claim, is based on a misrepresentation of the text of the instruction. As can be seen, this instruction did not specifically state that "deliberation can be formed in an instant." Accordingly, petitioner is attacking an instruction that was not given.

Furthermore, even if the Court construes the claim as a coherent attack on the constitutionality of this instruction, the claim suffers from at least four defects. Although Thompson raised the jury instruction in the state court, he relied purely on *State v. Brown*, 836 S.W.2d 530 (Tenn. 1992), and raised it only as an issue of state law. In *Thompson,* 958 S.W.2d at 173, the Tennessee Court of Criminal Appeals discussed the case of *State v. Brown,* 836 S.W.2d 530 (Tenn.1992), when it addressed Thompson's

claim that the erroneous jury instructions defining deliberation and premeditation required reversal. In *State v. Brown,* 836 S.W.2d 530, the court held that trial courts should no longer instruct juries that the premeditation required to sustain a conviction for first degree murder can be "formed in an instant." *Brown* did not address the constitutionality of instructions regarding a murder's instantaneous deliberation or premeditation. *Brown reaffirms that "no specific period of time need elapse between the defendant's formulation of the decision to kill and the execution of that plan."* In *Brown,* the Tennessee Supreme Court merely disapproved specific instructions that "premeditation may be formed in an instant" as part of its requiring Tennessee courts to observe the distinction between the elements of premeditation and deliberation. *Id.* at 543. By citing to this state law analysis, however, petitioner did not raise a federal claim of a due process violation. Any attempt to raise one now is barred by this procedural default. Moreover, reliance on *Brown* simply does not raise a cognizable federal claim, but merely a claim under state substantive law. In order to exhaust this issue, Thompson was required to raise the claim as a constitutional claim, not as an issue of state law to the highest state court. *Prather v. Rees*, 822 F.2d at 1420; *see also Koontz v. Glossa*, 731 F.2d at 368; *United States v. Fairman,* 707 F.2d 936, 940-41 (7th Cir. 1983). Thompson failed to raise this alleged violation as a constitutional issue in state court, and he has failed to show any cause and prejudice for this procedural default.

Furthermore, the Tennessee Court of Criminal. Appeals noted in *Thompson*, that *Brown* was decided after petitioner was convicted in this case; and the Tennessee Supreme Court has repeatedly held that *Brown* did not

announce a new constitutional principle. Accordingly, retroactive application is not permissible. *See, e.g., Lofton v. State*, 898 S.W. 2d 246, 250 (Tenn. Crim. App. 1994) (citing three unpublished cases holding *Brown* does not apply retroactively). Accordingly, petitioner's attempt to craft a federal procedural right out of this state court decision also runs afoul of *Teague's*[10] prohibition on non-retroactive application of new constitutional rules of criminal procedure.

Finally, any error is obviously harmless under *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). The evidence at trial clearly demonstrated that petitioner took far longer than "an instant" to prepare for and carry out the murder. On direct appeal the Tennessee Supreme Court found the proof showed a particularly senseless killing based on the following facts which show it took longer than "an instant" to prepare for and carry out the murder:

> The victim was driven some distance into rural Tennessee, stabbed multiple times and left alive, conscious, and alone to die on a winter night. It is highly probable she knew her fate in advance. There is evidence she was crying, and Defendant stated they circled a church off the rural road on the way to the scene of the stabbing. Although the physical evidence does not show the victim was struck by the wheels of the car, Defendant's statement that he drove the car over her body because she was still alive, and presumably to ensure her death, especially indicates a callous disregard for life. . . .

State v. Thompson, 768 S.W.2d 239 (Tenn. 1989).

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[10] *Teague v. Lane*, 489 U.S. 288, 297-99 (1989).

The preparation here distinguishes this case from *Brown*, in which the only evidence of these elements in *Brown* was repeated blows. *Brown* reversed the conviction on the basis of the lack of evidence of premeditation and deliberation, not because of a faulty jury instruction. The discussion of jury instructions was simply administrative guidance for future trials in the Tennessee courts. Accordingly, *Brown* does not support a constitutional attack on this instruction. Petitioner has failed to show that the instruction had a "substantial and injurious effect" on the jury's decision.

Accordingly, this claim will be **DISMISSED.**

Claim 25: UNCONSTITUTIONAL PENALTY PHASE JURY INSTRUCTIONS

Thompson claims the jury instructions at the penalty phase violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United State [sic] Constitution. Thompson claims the unconstitutional jury instructions include, but are not limited to, the six he listed. To the extent he challenges jury instructions that he failed to list, the claim will be **DISMISSED** for failure to set forth the facts supporting this claim as required by Rule 2 of the RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS.

Thompson first challenges the instructions regarding the aggravating circumstances:

> **(a) Instructions on aggravating circumstances which were unconstitutionally vague and overly broad as applied in petitioner's case and which did not adequately channel the jury's discretion and invited arbitrary, capricious,**

and inconsistent applications of the death penalty.

The state contends Thompson procedurally defaulted on this claim. Thompson has failed to specifically set forth the facts supporting this claim as required by Rule 2 of the RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS. Although the Court afforded Thompson the opportunity to file a supplemental brief after the hearing on the state's motion for summary judgment and the Court specifically told petitioner's counsel, "[i]f you're serious about this one [Claim 25], you need to tell us what instructions you're talking about . . . and what you say is constitutionally infirmed [sic] about them[,]" petitioner's counsel failed to specify the instruction he is challenging and the Court is unable to determine the specific instructions he is challenging. The Court notes in Thompson's direct appeal the Tennessee Supreme Court concluded that as to matters pertaining to capital sentencing, the jury was correctly and adequately instructed.

The Court has read the jury instructions where the trial court informed the jury that the death penalty could not be imposed unless the jury unanimously found one or more of three specified statutory aggravating circumstances had been proven beyond a reasonable doubt. Thompson does not identify any other specific instruction that should have been given. Furthermore, Thompson does not show that the state court's decision was contrary to or involved an unreasonable application of established federal law as determined by the United States Supreme Court, or that it involved an unreasonable determination of the facts in light of the state court evidence. Accordingly, subpart (a) will be **DISMISSED.**

Thompson fails to identify the specific instruction, in subpart (b) that he is challenging:

(b) Instructions which violated the United States Supreme Court's decision in *Mills v. Maryland*, 486 U.S. 367 (1988).

The state claims Thompson procedurally defaulted on this issue except that as it addresses and [sic] Eighth Amendment claim which the Tennessee Supreme Court has addressed. The Tennessee Supreme Court found that the jury instructions regarding how the jury was to determine the sentence did not include any of the objectionable features of the instructions in *Mills*.

Presumably, Thompson is arguing there was a probability the jurors believed they could only consider those mitigating circumstances they unanimously agreed were present. In *Mills v. Maryland,* 486 U.S. 367 (1988), the Supreme Court held the following instruction was impermissible: "Based upon the evidence we unanimously find that each of the following mitigation circumstances which is marked "yes' has been proven to exist by a preponderance of the evidence and each mitigating circumstance marked 'no' has not been proven by a preponderance of the evidence."

In *Mills v. Maryland,* the controversy was over section II and III of the verdict form. The pertinent parts are as follows:

II.

> Based upon the evidence we unanimously find that each of the following mitigating circumstances which is marked 'yes' has been proven to exits [sic] by A PREPONDERANCE OF THE

EVIDENCE AND EACH MITIGATING CIRCUMSTANCE MARKED 'NO' HAS NOT BEEN PROVEN BY A PREPONDERANCE OF THE EVIDENCE:

III.

Based on the evidence we unanimously find that it has been proven by A PREPONDERANCE OF THE EVIDENCE that the mitigating circumstances marked 'yes' in Section II outweigh the aggravating circumstances marked 'yes' in Section I.

The United States Supreme Court concluded that there was "a substantial probability that reasonable jurors, upon receiving the judge's instructions in this case, and in attempting to complete the verdict form as instructed, well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance." *Mills v. Maryland,* 486 U.S. at 382 (1988).

The instructions in the case before this Court consist of an unanimity instruction with regard to aggravating factors, but not with regard to mitigating ones. The following is the pertinent portion of the jury instruction regarding aggravating and mitigating factors:

> No death penalty shall be imposed unless you find unanimously that one or more of the following specified statutory aggravating circumstances has been proved on the trial and/or on the sentencing hearing beyond a reasonable doubt: . . .
>
> In arriving at the punishment, the jury shall consider, as heretofore indicated, any mitigating

> circumstances which shall include but not be limited to the following: . . .
>
> Thus, mitigating circumstances surrounding a criminal offense are those circumstances which tend to ameliorate or lessen the apparent badness of the particular crime in questions or the apparent badness of the particular defendant. Because different people may have different views about what tends to ameliorate or mitigate any particular offense, the law provides that you may weigh and consider any and all circumstances which you feel tend to mitigate the offense in question. There are eight statutory mitigating circumstances listed for your consideration, but you are in no way limited to these; and you are free to consider any other mitigating facts or circumstances. The law does not require you to list or specify what mitigating circumstances you find, weigh, or consider. You are further instructed as to mitigating circumstances that you may find that one or more mitigating circumstance, which you deem important, outweighs any or all of the aggravating circumstances you may have found.

(Addendum No, 1 I, pp. 80-81).

On direct appeal, the Tennessee Supreme Court found that the jury instructions in Thompson's case did not include any of the objectionable features of the instructions in *Mills.* The Tennessee Supreme Court found that "[t]he trial court emphasized the juror's autonomy in considering mitigating evidence by instructing, '[b]ecause different people may have different views about what tends to ameliorate or mitigate . . . you may weigh and consider any and all circumstances which you feel tend to

mitigate the offense or defendant in question.'" *Thompson v. State,* 768 S.W. 2d 239, 250 (Tenn. 1989).

Thompson failed to identify the specific instruction he contends violated the United States Supreme Court's decision in *Mills v. Maryland*, or provide an instruction that should have been given. This Court has reviewed the instructions given to the jury in petitioner's case and finds that they are not constitutionally infirm. In *Mills*, the jury was required to agree unanimously that a particular mitigating circumstance existed. By contrast, in petitioner's case, unanimity was required only for a finding that no mitigating circumstances outweighed the statutory aggravating circumstances in order for the death penalty to be imposed. "If the jury unanimously determines that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the State beyond a reasonable doubt, and said circumstance or circumstances are not outweighed by any sufficiently substantial mitigating circumstances, the sentence shall be death." (Addendum No. 1 I, p. 81). The state court's decision was not contrary to, nor did it involve, an unreasonable application of established federal law as determined by the United States Supreme Court. Accordingly, subpart (b) will be **DISMISSED.**

In subpart (c) of Claim 25, Thompson claims the following instruction was unconstitutional:

> **(c) Instructions on an [sic] aggravating circumstances which failed to narrow the class of persons eligible for the death penalty and to provide meaningful detailed guidance to the jury, including "murder during the course of a felony" aggravating circumstance.**

The state contends this claim is so inadequate that they are unable to determine whether they [sic] claim has been exhausted and this claim should be dismissed under Habeas Rule 2(c). Again, Thompson's counsel has failed to specifically identify the instruction he is challenging and therefore has failed to set forth the facts supporting this claim as required by Rule 2 of the RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS. However, this Court has reviewed the three specific aggravating circumstances instruction that the state trial court gave, and no instruction was given that included the language quoted by petitioner's counsel "murder during the course of a felony." Accordingly, this claim will be **DISMISSED**.

In subpart (d) of Claim 25 petitioner claims the following was an unconstitutional jury instruction:

> **(d) Instructions that shifted the burden of proof to petitioner to show the existence of mitigating circumstances.**

The state contends this claim was correctly rejected by the Tennessee Supreme Court when they determined the only relevant question for constitutional purposes was whether the jury instruction prevented the jury from considering any relevant mitigating circumstances offered by defendant as prohibited under *Mills v. Maryland.* Again, petitioner's counsel failed to specifically identify the instruction he is challenging. Assuming petitioner is claiming the instruction requiring the defendant to establish a mitigating circumstance by a preponderance of the evidence is unconstitutional, this claim is without merit. First, petitioner cites to no Supreme Court case law supporting the existence of a constitutional right prohibiting a state from requiring a petitioner to bear the burden

of demonstrating mitigating circumstances during a capital sentencing proceeding. Second, the United States Supreme Court has held "[s]o long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency." *Walton v. Arizona,* 497 U.S. 639, 650 (1990). Accordingly, this claim will be **DISMISSED.**

In Claim 25, subpart (e), Thompson claims the following instruction was unconstitutional:

> **(e) Instructions that the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind, despite the fact that there was no proof to support this aggravating circumstance.**

The state claims that Thompson has failed to raise this specific issue in the state courts. On direct appeal, when addressing Thompson's contention that there was not sufficient evidence the murder was especial heinous, atrocious, or cruel, the Tennessee Supreme Court found the evidence established an especially cruel murder involving torture or depravity of mind and that the language especially heinous, atrocious, or cruel was not unconstitutionally vague.[11] *Thompson v. State,* 768 S.W.2d

[11] The issue of whether this jury instruction was unconstitutionally vague is not before this Court. The issue before this Court is whether the instruction was unconstitutional because there was no proof to support the aggravating circumstance.

at 252. The Tennessee Supreme Court found the proof showed a particularly senseless killing indicative of depravity of mind.

> The victim was driven some distance into rural Tennessee, stabbed multiple times and left alive, conscious, and alone to die on a winter night. It is highly probable she knew her fate in advance. There is evidence she was crying, and Defendant stated they circled a church off the rural road on the way to the scene of the stabbing. Although the physical evidence does not show the victim was struck by the wheels of the car, Defendant's statement that he drove the car over her body because she was still alive, and presumably to ensure her death, especially indicates a callous disregard for life. Evidence that he felt remorse was sharply contradicted.

Thompson v. State, 768 S.W.2d at 252.

Petitioner has not shown that the state court's decision involved an unreasonable determination of the facts in light of the state court evidence, nor that the state court's decision was contrary to or involved an unreasonable application of established federal law as determined by the United States Supreme Court. Accordingly, subpart (e) will be **DISMISSED**.

Claim 25, subpart (f), claims the following instruction was unconstitutional:

> **(f) Instructions that the murder was committed for the purpose of avoiding, interfering with or preventing a lawful arrest or prosecution of the defendant or another, despite the fact that there**

was no proof to support this aggravating circumstance.

The state contends the petitioner procedurally defaulted and has failed to show cause and prejudice. The Court finds that petitioner has failed to present this issue to the highest Tennessee Court and has failed to show cause and prejudice. Accordingly, Claim 25, subpart (f), will be **DISMISSED** due to petitioner's procedural default.

Claim 26: TRIAL COURT ERRORS

Petitioner claims that either before trial, during the guilt/innocence phase or penalty phase of his trial, or during post trial or post-conviction proceedings, the Court committed errors that violated petitioner's constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Petitioner claims these constitutional errors include, but are not limited to the alleged errors he lists. To the extent he challenges court errors that he failed to list, the claim will be **DISMISSED** for failure to set forth the facts supporting this claim as required by Rule 2 of the RULES GOVERNING. SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS.

(a) The Court denied petitioner's pretrial, trial, post trial and post conviction motions, including but not limited to: motions to suppress, motions to change venue, motions to limit media coverage, motions for a judgment of acquittal, etc.

The state contends this claim fails to set forth the facts supporting the claim as required by Rule 2 of the

RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS. Petitioner fails to explain how denying these motions violated his constitutional rights or how the trial court's denial of these motions was contrary to or an unreasonable application of established federal law as determine [sic] by the United States Supreme Court. Nor does petitioner claim the trial court made its' decision to deny these motions based on an unreasonable determination of the facts in light of the evidence presented. Accordingly, subpart (a) of Claim 26 will be **DISMISSED.**

Subpart (b) of Claim 26 is similar to and intertwined with Claims 20 and 21:

(b) The Court failed to conduct a meaningful competency hearing notwithstanding clear indicia of Petitioner's incompetency at the time of trial. *See* Claims 20 and 21, *supra*.

The state claims petitioner procedurally defaulted on this claim and has failed to show cause and prejudice. Petitioner claims there was "clear indicia" of his incompetency at the time of trial. However, petitioner fails to provide any evidence that was available at the time of trial to prove petitioner's incompetence. Thompson was found to be competent and sane by Dr. Watson and his own expert, Dr. Copple. The behavior Thompson claims he exhibited prior to committing the crime supports Dr. Watson's diagnosis of antisocial behavior. Although petitioner submitted a deposition of his expert for these federal proceedings with a motion, Thompson failed to support his response to the motion for summary judgment with any affidavits, depositions, or anything other than his allegations. However, the Court notes that his expert was not even asked to attempt to determine his competency at

the time of the crime or trial. None of the experts who tested Thompson after he committed this crime found him to be incompetent or insane; and petitioner failed to cite, to anything in the record where any expert has found Thompson to be incompetent or insane at the time of the crime.

Petitioner claims the state court failed to conduct a meaningful competency hearing. After an exhaustive review of the record, this Court does not find that a competency hearing was held nor was a motion filed requesting such hearing. However, petitioner failed to raise this issue with the highest Tennessee court resulting in procedural default. Petitioner has failed to show cause and prejudice for his default. Accordingly, subpart (b) of Claim 26 will be **DISMISSED**.

In subpart (c) of Claim 26, petitioner claims the Tennessee court "kept relevant facts from the jury regarding petitioner's sentence and the law applicable to the penalties[.]" The petitioner lists seven things the court failed to do. The respondent claims the petitioner procedurally defaulted and failed to show cause and prejudice for his default. Although petitioner arguably presented these claims to the Tennessee Supreme Court in his direct appeal, he presented them similarly as he did here without any factual support. The Tennessee Supreme Court found that Thompson listed a number of issues they were unable to address because they were presented without argument. This Court finds that petitioner has procedurally defaulted on Claim 26(c)(i)-(vii) and has failed to show cause and prejudice for his default.

Additionally, regarding Claim 26(c)(vii): "Effect of a non-unanimous verdict as to sentence," the United States

Supreme Court recently held in *Jones v. United States*, 119 S. Ct. 2090, 2098-2100 (1999) that a defendant is not entitled to a jury instruction that the jury's failure to reach a unanimous sentencing recommendation automatically would result in a court-imposed sentence of life imprisonment without the possibility or release. Although the sentencing structure for death penalty cases was slightly different in 1985, in that life imprisonment without parole was not one of the possible sentences, the fact that the Eighth Amendment does not require the jury be instructed as to the consequences of their inability to agree renders this issue meritless. Moreover, Thompson has not presented this issue to the highest Tennessee state court. Thompson has procedurally defaulted this claim because he failed to raise the issue in the highest state court or show cause and prejudice for his procedural default. Accordingly, this claim will be **DISMISSED.**

In subpart (d) of Claim 26, petitioner claims the Court allowed the jury to consider the impact of the crime on the victim or the victim's family. The state claims petitioner has never raised this in terms of a constitutional violation in state court. Petitioner does deny his procedural default. (Court File No. 104, p. 31). Accordingly, this issue will be **DISMISSED** on the grounds of procedural default.

In subpart (e) of Claim 26, petitioner alleges the court allowed the jury to consider non-statutory aggravating circumstances and failed to grant a motion restricting the state to the specific aggravating circumstances filed prior to trial. "As a result, non-probative and highly prejudicial information was admitted against the defendant concerning his military records and post-crime correspondence which constituted hearsay but did not fit into any recognized hearsay exception. Further, this information was used in the cross-examination of character witnesses

which did not have any relationship or personal knowledge of the information, for the sole purpose of introducing incompetent, highly prejudicial information to the jury."

The state claims petitioner procedurally defaulted on this claim and failed to show cause and prejudice for his default. Thompson does not deny he failed to present these claims as constitutional issues to the highest state court of Tennessee. Accordingly, subpart (e) of Claim 26 will be **DISMISSED.**

It is claimed by Thompson in Claim 26, subpart (f), that the Tennessee trial court interpreted the statutory aggravating circumstances to allow the introduction of the following improper evidence:

> **(f) i. A videotape created by the State reenacting the alleged trip that the victim was taken on immediately prior to her death, which contained factual inaccuracies, was irrelevant, speculative and highly prejudicial.**
>
> **ii. Testimony by Dr. Glenn Watson, Ph.D., who participated in the Defendant's competency evaluation which was held without Defendant having been advised of his constitutional rights and without counsel having been notified that any information revealed in the competency evaluation could be used against the Defendant at trial.**

The state contends petitioner filed to raise Claim 26, subpart (f) as a constitutional issue in the highest state

court. Thompson claims he raised part (i) of subpart (f) on direct appeal and in his state post-conviction proceedings. Petitioner failed to raise subpart (f) of Claim 26 as a constitutional issue in state court resulting in procedural default for which he fails to offer any cause and prejudice. Furthermore, for the sake of argument, even if petitioner raised subpart (f)(i) as a constitutional issue there is no showing that the state court's decision was contrary to or involved an unreasonable application of established federal law as determined by the United States Supreme Court, or that it involved an unreasonable determination of the facts in light of the state court evidence. Accordingly, subpart (f) of Claim 26 will be **DISMISSED.**

Claim 26, subpart (g) challenges certain rulings that were made during petitioner's state court post-conviction proceedings. The state contends subpart (g) fails to state a claim for habeas corpus relief because it relates to post-conviction matters.

Thompson is complaining about state post-conviction proceedings. Thompson claims the State of Tennessee denied him expert and investigative funding at post-conviction necessary to present his claims of constitutional error. 28 U.S.C. § 2254(a) states that a federal court "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." Section 2254 gives federal courts the jurisdiction to determine the constitutionality of a state criminal conviction, but not the authority to review state post-conviction proceedings. *Williams-Bey v. Trickey*, 894 F.2d 314, 317 (8th Cir.), *cert. denied,* 495 U.S. 936 (1990);

Mitchell v. Wyrick, 727 F.2d 773, 774 (8th Cir.), *cert. denied*, 469 U.S. 823 (1984).

As the Court has previously stated, the writ of habeas corpus is not the proper means by which a prisoner should challenge errors or deficiencies in state post-conviction proceedings because these claims address collateral matters and not the underlying state conviction giving rise to the prisoner's incarceration. *Kirby v. Dutton,* 794 F.2d 245, 247 (6th Cir. 1986). "Even where there may be some error in state post-conviction proceedings, this would not entitle appellant to federal habeas corpus relief since appellants claim here represents an attack on a proceeding collateral to detention of appellant and not on the detention itself ... Infirmities in state habeas corpus proceedings do not constitute grounds for federal habeas relief." *Vail v. Procunier*, 747 F.2d 277 (5th Cir. 1984).

The Constitution does not require the states to provide a means of post-conviction review therefore, an infirmity in a state post-conviction proceeding does not raise a constitutional issue and is not cognizable in a federal habeas petition. *Tokar v. Bowersox,* 1 F. Supp. 2d at 1015; *Gee v. Groose,* 110 F.3d at 1351-52; *Jolly v. Gammon,* 28 F.3d at 54; *Williams-Bey v. Trickey*, 984 F.2d at 317. Accordingly, subpart (g) of Claim 26 will be **DISMISSED** for failure to state a claim for habeas corpus relief.

Thompson claims in subpart (h) of Claim 26 that the trial court "refused to admit, or even receive an offer of proof as to relevant testimony in the penalty phase, specifically, the testimony of Dr. David Wheaton, and refused to admit relevant psychological testimony by Dr. Copple[.]" (Court File No. 17, p. 30, Claim 26 (h)). The

state contends this claim was raised on direct appeal as a state evidentiary issue, not a federal constitutional violation, resulting in procedural default for which petitioner offers no showing of cause and prejudice.

First, Thompson claims the trial court refused to receive an offer of proof by Dr. David Wheaton. The Court finds this claim is untrue because in Addendum II, pages 99 through 122, David K. Wheaton testified outside of the presence of the jury. The state trial court and the Tennessee Supreme Court found that the evidence offered by Dr. Wheaton had no probative value on the circumstances of this crime or the character of this defendant, and therefore it was properly excluded.

Petitioner has not shown that the state court's decision involved an unreasonable determination of the facts in light of the state court evidence nor, that the state court's decision was contrary to or involved an unreasonable application of established federal law as determined by the United States Supreme Court, or that it involved an unreasonable determination of the facts in light of the state court evidence. Accordingly, Claim 26, subpart (h), will be **DISMISSED**.

Second, Thompson claims the trial court refused to admit relevant psychological testimony of Dr. Copple. Dr. Copple testified during Thompson's penalty hearing. Thompson has failed to specify the relevant psychological testimony Dr. Copple was prohibited from giving. Thompson's counsel has failed to specifically identify the excluded testimony or to cite the Court to the record where the trial court ruled Dr. Copple could not testify, Therefore, he has failed to set forth the facts supporting this claim as required by Rule 2 of the RULES GOVERNING SECTION 2254

CASES IN THE UNITED STATES DISTRICT COURTS. Additionally, the Court does not find that Thompson raised this issue with the highest Tennessee court, resulting in procedural default. Accordingly, this claim will be **DISMISSED.**

In subpart (i) of Claim 26, Thompson claims the state court improperly refused to suppress his confession, which was taken in violation of his federal constitutional rights. The state contends this claim is too vague and improperly pled. However, the state agrees the issue regarding the suppression was challenged on direct appeal.

The Tennessee Supreme Court found the trial court's finding was supported by the evidence. The evidence showed the defendant clearly initiated the interview an hour and a half later, and he understood his right to counsel and his right to remain silent and he voluntarily relinquished them. Petitioner has not shown that the state court's decision involved an unreasonable determination of the facts in light of the state court evidence nor, that the state court's decision was contrary to or involved an unreasonable application of established federal law as determined by the United States Supreme Court. Accordingly, this subpart (i) of claim 26 will be **DISMISSED.**

Petitioner claims in subpart (j) of Claim 26 that the state court failed to send the jury instructions from the guilt phase into the jury room during penalty deliberations. The state contends that petitioner has failed to raise this issue to the highest state court resulting in procedural default for which he offers no proof of cause and prejudice. Thompson claims he raised this issue in his amended petition for post-conviction relief.

The Tennessee Supreme Court addressed this issue on Thompson's direct appeal and found that in absence of a special request, the trial court does not need to repeat the original charge or submit it in writing to the jury so long as the jury is adequately instructed on the issues presented for their determination in the sentencing hearing. Petitioner does not contend, nor does this Court find, that the state court's decision involved an unreasonable determination of the facts in light of the state court evidence nor, that the state court's decision was contrary to or involved an unreasonable application of established federal law as determined by the United States Supreme Court. Accordingly, subpart (j) of Claim 26 will be **DISMISSED**.

Claim 27: TRIAL COURT ERRORS IN VOIR DIRE

Thompson claims the trial court committed errors during voir dire which violated his Fifth, Sixth, Eighth, and Fourteenth Amendment rights. Petitioner lists six claims without providing any factual support or cites to the record. Petitioner fails to specify which jurors were improperly excluded and which jurors were improperly not excluded. The record in this case is voluminous and the jury selection alone consists of more than one notebook. Although this Court has spent a substantial number of hours reading the record and attempting to decipher petitioner's factually unsupported claims, it is unable to determine exactly what petitioner's claims are in Claim 27. The state claims petitioner has failed to plead these claims with sufficient specificity to determine what the claims are and which jurors he is referring to in this claim. During oral argument on the state's motion for summary judgment Thompson's attorney informed the Court that it was his intent to raise the issues which were presented to

the state courts. Counsel for petitioner stated "[t]hese claims basically were meant to mirror the claims that had been presented in state court." (Motion Hearing Transcript, pp. 115-116).

Thompson has the burden of showing that the state court's decision involved an unreasonable determination of the facts in light of the state court evidence or, that the state court's decision was contrary to or involved an unreasonable application of established federal law as determined by the United States Supreme Court. Thompson has failed to cite any federal law or even make an allegation that the state court's decision involved an unreasonable determination of the facts in light of the state court evidence or, that the state court's decision was contrary to or involved an unreasonable application of established federal law as determined by the United States Supreme Court.

On direct appeal the Tennessee Supreme Court found that petitioner's motion to quash the indictment on grounds the grand jury was not impaneled, and its foreman appointed in conformity with TENN. CODE ANN. § 16-2-510 was properly denied. Thompson presented this issue to the Tennessee Supreme Court as a violation of state law and not as a violation of his Constitutional rights. Therefore, this issue is "not cognizable in a federal habeas corpus proceeding." *Spalla v. Foltz,* 788 F.2d 400, 405 (6th Cir. 1986), *cert. denied*, 479 U.S. 935 (1986). *See also Estelle v. McGuire,* 502 U.S. 62, 67-68 (1991) ("[W]e reemphasize that it is not the province of a federal habeas court to reexamine state court determinations on state law questions[.]"); *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990) ("[F]ederal habeas corpus relief does not lie for errors of state law[.]"); *Pulley v. Harris*, 465 U.S. 37, 41 (1984) ("A

federal court may not issue the writ on the basis of a perceived error of state law."); *Sinistaj v. Burt,* 66 F.3d 804, 807 (6th Cir. 1995) ("Errors of state law alone cannot form the basis of relief under federal habeas corpus."); *Houston v. Dutton,* 50 F.3d 381, 385 (6th Cir.), *cert denied,* 516 U.S. 905 (1995) ("When and how state law applies to a particular case is a matter on which the state supreme court has the last word. No federal issues are implicated and no federal questions [sic] is presented in determining whether a change in state law is to be applied retroactively.") (citation omitted). To the extent petitioner seeks to present this claim as a federal constitutional issue, he is procedurally barred from doing so. Accordingly, this claim will be **DISMISSED.**

Thompson also, challenged the composition of the jury on the grounds it did not reflect a fair cross-section of the community as guaranteed by the Sixth Amendment. The Tennessee Supreme Court resolved the issue after reviewing the proof and found that the representation was neither unfair or unreasonable.

> Defendant also challenged the composition of the jury on the grounds it did not reflect a fair cross-section of the community, as guaranteed by sixth amendment. He particularly asserts that black people, women, young people, persons not registered to vote, and an unnamed religious group were underrepresented. To establish a prima facie violation, it must be shown 1) that the allegedly excluded group is a distinctive group in the community; 2) that its representation on the venire is not fair and reasonable in relation to its numbers in the community; and 3) that the underrepresentation resulted from systematic

exclusion. *Duren v. Mississippi*, 439 U.S. 357, 364, 99 S.Ct. 664, 668, 58 L.Ed.2d 579 (1979).

Of the allegedly excluded groups only black persons and women meet the first criterion. Although it is possible as a matter of proof to show that others are cognizable groups in a community, it has not been done in this record. *Cf. State v. Nelson*, 603 S.W.2d 158 (Tenn. Cr. App. 1980).

With respect to the second criterion, the, defendant, who was black, has shown the Coffee County population is 96% white and 3.4% black; it is 48.8% male and 51.2% female. The venire of three hundred and ten included six black persons (1.9%); 57% were male and 43% were female. Assuming these percentages relate to the population qualified to serve as jurors, we do not find the representation either unfair or unreasonable. We are cited to no authority that the disparities shown are legally significant, and the record contains no expert analysis that they are statistically significant. Numerical evidence about the group actually served by the sheriff, those answering questionnaires, and those finally selected to serve at this trial are not relevant. In addition, the use of a voter registration list is not a "political test," and there are no data in this record to show that it is an inadequate or discriminatory source of names of potential jurors. *See State v. Caruthers*, 676 S.W.2d 935 (Term. 1984).

State v. Thompson, 768 S.W.2d 239, 245-246 (Tent. 1989).

The Equal Protection Clause likewise prohibits discrimination in the selection of grand jurors. *Rose v. Mitchell*, 443 U.S. 545, 555-56 (1979); *Castaneda v. Partida*, 430 U.S. 482, 494 (1977). A prima facie case is established if a party shows that: 1) the group excluded is a

recognizable, distinct class capable of being singled out for different treatment under the laws; 2) the grand jury selection process is susceptible to abuse or is not racially neutral; and 3) the degree of underrepresentation has occurred over a significant period of time, thus eliminating the chance of having randomly selected a skewed proportion of the population for that party's trial. *Castaneda*, 430 U.S. at 494; *accord Jefferson v. Morgan*, 962 F.2d 1185, 1188-89 (6th Cir.), *cert. denied*, 506 U.S. 905 (1992).

The trial court conducted a hearing on petitioner's motion to quash the jury panel. (Addendum 1 C, pp. 2-84). Mr. A.C. Willis, one of the jury commissioners for Coffee County testified, that the Circuit Court Clerk obtains the voter registration list from the Registrar of Voters. Mr. Willis testified he had the 1st, 7th and 8th Districts of Coffee County and the other districts were divided between the other two Commissioners. Mr. Willis went through the voter registration list every two years and randomly picked out whatever number of people the Judge directed him to pick. He would draw out a name, unless he knew the person had moved, died, or was disabled, and put the name in the jury box. Then a child under the age of ten is brought and selects the names out of the box for a jury venire for a term of court. The form he filled out whenever he drew a jury venire included a space to mark if someone was disabled, moved, or had died. (Addendum 1 C, pp. 16-19).

Petitioner failed to establish that the alleged under-representation of blacks in the jury pool was the result of systematic exclusion. Petitioner does not point to anything in the selection process which makes it obvious that the alleged under-representation of African-Americans was due to the system itself. Thompson's jury panel was

selected by the use of the voter registration list and the voter registration list has been expressly sanctioned by Congress in 28 U.S.C. 1863(b)(2) and is the preferred source of names for prospective jurors. *See Taylor v. Louisiana*, 419 U.S. 522, 538 (1975). The voter registration lists used to select jurors did not include information regarding the voter's race and therefore, there is no showing the procedures themselves were not racially neutral.

The proof supports the trial court's ruling denying the motion to quash the jury panel and the Tennessee Supreme Court's finding that the representation was neither unfair or unreasonable. The petitioner has not alleged, nor does the Court find, that the state court's decision involved an unreasonable determination of the facts in light of the state court evidence nor, that the state court's decision was contrary to or involved an unseasonable application of established federal law as determined by the United States Supreme Court. Accordingly, subpart (d) of Claim 27 will be **DISMISSED.**

As to the remainder of Claim 27, to the extent the issues were presented to the state courts, Thompson has failed to cite any federal law or even make an allegation that the state court's decision involved an unreasonable determination of the facts in light of the state court evidence or, that the state court's decision was contrary to or involved an unreasonable application of established federal law as determined by the United States Supreme Court. Petitioner has failed to meet his burden and accordingly, Claim 27 will be **DISMISSED.**

Claim 28. INSUFFICIENCY OF THE EVIDENCE SUPPORTING FIRST DEGREE MURDER CONVICTION

Thompson claims that the evidence introduced at petitioner's trial on guilt or innocence, when viewed in the light most favorable to the prosecution, was insufficient to allow a rational trier of fact finder petitioner guilty of first degree murder beyond a reasonable doubt. Thompson claims his conviction of first degree murder and sentence of death violate the Eighth and Fourteenth Amendments to the United States Constitution. The state contends petitioner procedurally defaulted on this issue because he never challenged the sufficiency of the evidence of the guilt phase.

Thompson has not presented this issue to the highest Tennessee state court. He has procedurally defaulted this claim because he failed to raise the issue in the highest state court or show cause and prejudice for his procedural default. Accordingly, this claim will be **DISMISSED.**

Claim 29: INSUFFICIENT EVIDENCE SUPPORTING HEINOUSNESS AND AVOID ARREST AGGRAVATING CIRCUMSTANCES

Petitioner claims the evidence introduced during the penalty phase of petitioner's trial, when viewed in the light most favorable to the prosecution, was insufficient to allow a rational trier of fact to find the "especially heinous, atrocious or cruel" and/or the "murder committed for the purposes of avoiding, interfering with or preventing a lawful arrest or prosecution of the defendant or another" aggravating factors. The state contends the state court's decision did not involve an unreasonable determination of

the facts in light of the state court evidence nor, was the state court's decision contrary to or involve an unreasonable application of established federal law as determined by the United States Supreme Court.

The Tennessee Supreme Court addressed this issue on Thompson's direct appeal:

> [33] In several issues Defendant questions the sufficiency of the evidence to support the jury's findings that the murder was committed to prevent the lawful apprehension of Defendant and his companion, T.C.A. § 39-2-203(i)(6), and that the murder was especially heinous, atrocious, and cruel, T.C.A. § 39-2-203(i)(5). There can be no reasonable doubt that the surviving victim could have identified the twosome and raised an alarm, after the theft of her car, and there is nothing in Defendant's statement, the physical evidence, or any other circumstances to suggest another purpose for the Killing. *See State v. Coe,* 655 S.W.2d 903, 913 (Tenn. 1983). The record is sufficient to establish this aggravating circumstance.
>
> [34] The proof also establishes an especially cruel murder involving torture or depravity of mind. It shows a particularly senseless killing indicative of depravity of mind. The victim was driven some distance into rural Tennessee, stabbed multiple times and left alive, conscious, and alone to die on a winter night. It is highly probable she knew her fate in advance. There is evidence she was crying, and Defendant stated they circled a church off the rural road on the way to the scene of the stabbing. Although the physical evidence does not show the victim was struck by the wheels of the car, Defendant's statement that he drove the car over her body because she was still alive, and

> presumably to ensure her death, especially indicated a callous disregard for life. Evidence that he felt remorse was sharply contradicted.

State at *Thompson*, 768 S.W.2d 239, 252 (Tenn. 1989).

Petitioner has failed to establish that the state court's decision involved an unreasonable determination of the facts in light of the state court evidence or, that the state court's decision was contrary to or involved an unreasonable application of established federal law as determined by the United States Supreme Court. Petitioner has failed to meet his burden and accordingly, Claim 29 will be **DISMISSED**.

Claim 30: ARBITRARY IMPOSITION OF THE DEATH PENALTY AND INSUFFICIENT PROPORTIONALITY REVIEW

Petitioner claims "[t]he state violated [his] rights under the Fourteenth Amendment to the United States Constitution because it imposed his sentence of death without following state procedures for narrowing the class of persons eligible for death afforded other similarly situated persons convicted of first degree murder in the State of Tennessee." The state contends the petitioner insufficiently pled this claim. During the oral argument on the state's motion for summary judgment, petitioner's counsel stated probably more cumulative than vague," (Motion Hearing Transcript, p. 119).

Petitioner fails to state what state procedures were not followed. Therefore, he has failed to set forth the facts supporting this claim as required by Rule 2 of the RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS. Moreover, the Court does not find that Thompson presented this issue to the highest Tennessee

state court. Thompson has procedurally defaulted this claim because he failed to raise the issue in the highest state court or show cause and prejudice for his procedural default. Accordingly, this claim will be **DISMISSED.**

Claim 31: TENNESSEE'S UNCONSTITUTIONAL DEATH PENALTY STATUTE

Thompson claims in essence, that the Tennessee Death Penalty Statute is unconstitutional. The state contends that subpart (a) was presented to the Tennessee Supreme Court and decided on the merits. As to subparts (b) through (n), the State contends petitioner never specifically presented those issues to the Tennessee Supreme Court. Counsel for petitioner argued that under the futility doctrine it would be futile for him to have presented these challenges to the state court and petitioner contends Claim 31 should be subject to § 2254(d) review. The issues that were not presented to the Tennessee Supreme Court will be **DISMISSED** under grounds of procedural default.

On direct appeal, the Tennessee Supreme Court found that the Tennessee capital sentencing procedure is not unconstitutional. The Tennessee Supreme Court found that the state is properly permitted final argument and that a jury qualified on capital sentencing issues is not incompetent to determine the guilt or innocence of the accused. The Tennessee Supreme Court found that TENN. CODE ANN. § 39-2-203 satisfied the constraints of the eighth amendment. The Tennessee Supreme Court has previously held that Tennessee's death penalty statutes are constitutional. *See State v. Burns*, 1997 WL 418492, at *22 (Tenn. Crim. App. 1997), *aff'd*, 979 S.W.2d 276 (Tenn. 1998), *cert. denied*, 119 S. Ct. 2402 (1999); *State v. Smith*,

893 S.W.2d 908 (Tenn. 1994), *cert. denied*, 516 U.S. 892 (1995); *State v. Brimmer*, 876 S.W.2d 75 (Tenn. 1994), *cert. denied*, 513 U.S. 1020 (1994); *State v. Cazes*, 875 S.W.2d 253 (Tenn. 1994), *cert. denied*, 513 U.S. 1086 (1995); *State v. Smith*, 857 S.W.2d 1 (Tenn. 1993), *cert. denied*, 510 U.S. 996 (1993); *State v. Black*, 815 S.W.2d 166 (Tenn. 1991); *State v. Boyd*, 797 S.W.2d 589 (Tenn. 1990), *cert. denied*, 498 U.S. 1074 (1991); *State v. Teel*, 793 S.W.2d 236 (Tenn. 1990), *cert. denied*, 498 U.S. 1007 (1990); *State v. Thompson*, 768 S.W.2d 239 (Tenn. 1989), *cert. denied*, 497 U.S. 1031 (1990).

Thompson has failed to establish that the state court's decision involved an unreasonable determination of the facts in light of the state court evidence or, that the state court's decision was contrary to or involved an unreasonable application of established federal law as determined by the United States Supreme Court. Petitioner has failed to meet his burden and accordingly, Claim 31 will be **DISMISSED.**

Claim 32 INADEQUATE STATE APPELLATE REVIEW

Petitioner claims the statutory provisions and actual practices that govern appellate review of death sentences in Tennessee and that were utilized in reviewing his sentence of death on appeal violated the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. In essence, petitioner is claiming the state review process is deficient. The state contends petitioner procedurally defaulted on these claims.

Thompson fails to specify how the state appellate procedures are deficient. Petitioner has made speculative conclusions without setting forth facts supporting the

claims. Therefore, Thompson has failed to set forth the facts supporting this claim as required by Rule 2 of the RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS. Moreover, Thompson has not presented this issue to the highest Tennessee state court. Thompson has procedurally defaulted this claim because he failed to raise the issue in the highest state court or show cause and prejudice for his procedural default. Accordingly, Claim 32 will be **DISMISSED.**

Claim 33: GRUESOME, IRRELEVANT, AND UNDULY PREJUDICIAL PHOTOGRAPHIC EVIDENCE

Petitioner claims his constitutional rights were violated when the jury was permitted to view prejudicial photographs and hear testimony regarding the "expression" on the victim's face after the murder. The state claims the jury was not permitted to see photos of the victim's face or testimony regarding her expression. Furthermore, the state claims Thompson procedurally defaulted on this claim because he failed to raise the issue in the highest state court or show cause and prejudice for his default.

Thompson has failed to set forth the facts supporting this claim as required by Rule 2 of the RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS. Petitioner does not identify the specific photographs the jury viewed which allegedly were prejudicial, nor does he cite to the record regarding the testimony he alleges was presented. Moreover, petitioner's counsel conceded this issue was not raised on his appeal from the denial of his state post-conviction petition, although he argued the default should be excused due to state post-conviction counsel's ineffective assistance. Thompson has

not presented this issue to the highest Tennessee state court. He has thus procedurally defaulted this claim because he failed to raise the issue in the highest state court or show cause and prejudice for his procedural default. Accordingly, Claim 33 will be **DISMISSED.**

Claim 34: NO COMPELLING STATE INTEREST IN THE DEATH PENALTY

Petitioner claims the state violated his Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it has failed to demonstrate that, in light of petitioner's fundamental right to life, the death penalty is necessary to promote any compelling state interest and is the least restrictive means of achieving any such interest.

The state contends petitioner procedurally defaulted on this claim. Thompson has not presented this issue to the highest Tennessee state court. He has thus procedurally defaulted this claim because he failed to raise the issue in the highest state court or show cause and prejudice for his procedural default. Accordingly, Claim 34 will be **DISMISSED.**

Claim 35: JUDICIAL ELECTROCUTION IS CRUEL AND UNUSUAL PUNISHMENT

Petitioner claims the state has violated his Fifth Sixth, Eighth, and Fourteenth Amendment rights because electrocution constitutes cruel and unusual punishment. The state contends petitioner has procedurally defaulted on this issue and failed to sufficiently plead this claim. Petitioner's counsel argued that the evidence which shows that its cruel and unusual has only been available since

the statute of limitations has expired for him to seek relief in state court. Thompson does not cite to any cases or facts to support his claim that death by electrocution constitutes cruel and unusual punishment.

The Court finds this argument to be frivolous and fails to show cause and prejudice for petitioner's procedural default. Petitioner has known of the possibility of execution for over ten years, The legal basis of such a challenge has been apparent for many years. *See Glass v. Louisiana*, 471 U.S. 1080 (1985) (Justice Brennan and Justice Marshall dissented from the denial of certiorari because in their opinion there was considerable evidence which raised a substantial question whether electrocution violates the Eighth Amendment.). Furthermore, this claim is frivolous as a matter of law. *McQueen v. Patton,* 118 F.3d 460, 464 (6th Cir. 1997) (holding that "[e]lectrocution has never been found to be cruel and unusual punishment by any American court.").

Thompson did not present this issue to the highest Tennessee state court. Thompson has procedurally defaulted this claim because he failed to raise the issue in the highest state court or show cause and prejudice for his procedural default. This Court cannot consider Thompson's claim that death by electrocution[12] constitutes cruel and unusual punishment. Accordingly, Claim 35 will be **DISMISSED.**

[12] TENN. CODE ANN. § 40-23-114 (1998) changed the method of execution from electrocution to lethal injection for those persons sentenced to death after January 1, 1999, and provides that persons sentenced to death prior to January 1, 1999, may choose to be executed by lethal injection by signing a written waiver.

Claim 36: TENNESSEE'S UNCONSTITUTIONAL DEATH PENALTY STANDARD

Petitioner claims the Tennessee Death Penalty is based upon an unconstitutional standard. The state claims petitioner procedurally defaulted on this claim.

Thompson has failed to set forth the facts supporting this claim as required by Rule 2 of the RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS. Petitioner does not identify the standard, nor does he explain how the standard is unconstitutional. Moreover, petitioner's counsel argued this claim is, in fact, cumulative in that . . . it's a general statement of errors that are described elsewhere in the petitioner [sic]." (Motion Hearing, p. 130). Additionally, Thompson failed to present this issue to the highest Tennessee state court. Thompson has procedurally defaulted this claim because he failed to raise the issue in the highest state court or show cause and prejudice for his procedural default. Accordingly, Claim 36 will be **DISMISSED.**

Claim 37: COMPETENCY TO BE EXECUTED

Petitioner claimed he could not be executed due to his incompetency. However, during oral argument on the state's motion for summary judgment counsel conceded that this issue is not ripe for adjudication and the state agreed. At this time, an imminent execution date has not been scheduled.

Once an execution date is imminent, the state courts must first be given the opportunity to consider this claim. *See Stewart v. Martinez-Villareal,* 118 S. Ct. 1618 (1998); *Franklin v. Francis*, 168 F.3d 261, 262 (6th Cir. 1999); *Van*

Tran v. State, 6 S.W.2d 257 (1999).[13] Accordingly, Claim 37 will be **DISMISSED WITHOUT PREJUDICE.**

Claim 38: ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY

Petitioner claims his sentence violates the Eighth and Fourteenth Amendments to the United States Constitution because the death penalty in Tennessee is imposed in an arbitrary, capricious and irrational manner. The state claims petitioner procedurally defaulted on this claim. During oral argument, petitioner's counsel agreed "it's cumulative and that the issues raised in Claim 38 are addressed elsewhere."

Thompson did not present this issue to the highest Tennessee state court. Thompson has procedurally defaulted this claim because he failed to raise the issue in the highest state court or show cause and prejudice for his procedural default. Accordingly, Claim 38 will be **DISMISSED.**

[13] In this case the Tennessee Supreme Court clarified the procedure by which a prisoner who has been sentenced to death may raise the issue of present mental competency to be executed. The issue of competency to be executed is generally ripe for determination only when a prisoner sentenced to death has unsuccessfully pursued all state and federal remedies for testing the validity and correctness of the prisoner's conviction and sentence and the Tennessee Supreme Court has set an execution date upon motion of the State Attorney General. The prisoner should raise the issue of competency to be executed in the first instance in the Tennessee Supreme Court when filing a written response to the motion of the State Attorney General to set an execution date.

Claim 39: DEATH PENALTY NOT JUSTIFIED

Thompson claims Tennessee's death penalty lacks any constitutional, moral or penological justification in violation of the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. The state contends petitioner procedurally defaulted on this claim. Petitioner's counsel informed the Court it was cumulative. (Motion Hearing Transcript, p. 135).

Thompson failed to present this issue to the highest Tennessee state court. Thompson has procedurally defaulted this claim because he failed to raise the issue in the highest state court or show cause and prejudice for his procedural default. Accordingly, Claim 39 will, be **DISMISSED.**

Claim 40: NON-STATUTORY AGGRAVATORS

Petitioner claims the jury considered non-statutory aggravating circumstances such as petitioner's future dangerousness, his lack of love, compassion, remorse, empathy and sympathy; victim impact testimony; victim characteristics; and petitioner's failure to testify. The state contends petitioner procedurally defaulted on these claims because he has never raised these claims in the state court in the terms that he raises before this Court.

In essence, Thompson is complaining about certain testimony that was introduced in rebuttal to petitioner's proof of his good character during the penalty phase of his trial. Petitioner's counsel agreed there was not any evidence introduced regarding petitioner's failure to testify. (Motion Hearing Transcript, p. 137.) To the extent this claim is subject to § 2254 review, the petitioner does not

show that the state court's decision involved an unreasonable determination of the facts in light of the state court evidence are that the state court's decision was contrary to or involved an unreasonable application of established federal law as determined by the United States Supreme Court. To the extent petitioner failed to raise these claims in the highest state court, the Court finds he has procedurally defaulted and failed to show cause and prejudice to excuse his default. Accordingly, Claim 40 will be **DISMISSED.**

Claim 41: BRADY CLAIM

Petitioner claims the prosecution withheld exculpatory evidence, including evidence demonstrating that petitioner was not competent at the time of trial and/or at the time of his post-conviction proceedings. Thompson claims the prosecution knowingly presented false evidence both during and prior to his capital trial and sentencing, Specifically, petitioner claims the prosecution falsely presented evidence that he was competent at the time of trial and/or at the time of the offense and/or at the time of his post-conviction proceedings. Thompson further claims "[t]he evidence was highly exculpatory to both the jury's determination of petitioner's guilt and its consideration of the proper sentence. There is a reasonable probability that, had the evidence not been withheld, the jurors would not have convicted Thompson and would not have convicted petitioner and would not have sentenced the petitioner to death.

The state contends this claim is barred by petitioner's procedural default. Furthermore, they contend petitioner fails to state a *Brady* claim because there is no claim that

exculpatory evidence of the petitioner's guilt or innocence was withheld.

Thompson's own expert testified during his sentencing hearing that he was competent. The Court has been unable to find any expert testimony anywhere in the record that petitioner was incompetent at the time he committed the crime or during his trial, Petitioner alleges the state prosecutor engaged in false or misleading questioning and use of reports to argue that petitioner was competent and not mentally ill. "The prosecutor misled Petitioner's judge and jury despite having evidence to the contrary, and without revealing such evidence, there by committing gross misconduct" The petitioner has not event [sic] alluded to what the "evidence to the contrary" was that the prosecution allegedly concealed from the judge and jury.

Petitioner does not specifically identify the exculpatory evidence which was withheld by the prosecution that demonstrated he was not competent at the time of trial. Thompson further fails to identify the false evidence the prosecution knowingly presented during and prior to his capital trial and sentencing. Petitioner has made some very serious and disparaging allegations but has failed to provide any factual support whatsoever. The Court cautions petitioner and his counsel that these allegations are made under oath.

Petitioner's medical record consists of numerous indications that he has attempted to fake mental illness. His medical records also show that he has taken medication for alleged mental illness. Petitioner has failed to set forth the facts supporting this claim as required by Rule 2 of the RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS. There are absolutely no

facts presented to show the prosecution withheld exculpatory evidence during petitioners jury trial. Thompson's mental condition while incarcerated is not relevant to this claim nor this proceeding since a habeas corpus proceeding challenges the constitutionality of conviction and sentence. The only issue where petitioner's present mental condition would be important, would be the issue regarding his competency to be executed which is not before this Court. Moreover, the Court finds that petitioner has procedurally defaulted and failed to show cause and prejudice to excuse his default. Accordingly, Claim 41 will be **DISMISSED.**

Claim 42: FUNDAMENTAL DENIAL OF DUE PROCESS

Thompson claims that all of the aforementioned United States Constitutional errors, when considered in combination with each other, constitute a fundamental denial of due process of law such that the petitioner is entitled to a new trial on guilt and punishment in this cause.

The state contends the petitioner has procedurally defaulted on this claim. Petitioner's counsel stated it was cumulative. The Court finds this issue is procedurally barred and accordingly, will be **DISMISSED.**

V. Conclusion

The respondent's motion for summary judgment will be **GRANTED** as to all claims. Thompson is not entitled to an evidentiary hearing, and his § 2254 petition will be **DISMISSED.**

An order will enter.

/s/ R. Allan Edgar
R. ALLAN EDGAR
CHIEF UNITED STALES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GREGORY THOMPSON,	§	
Petitioner-Appellant	§	
	§	
v.	§	Case No. 00-5516
RICKY BELL, Warden,	§	
	§	
Respondent-Appellee	§	

MOTION TO HOLD APPEAL IN ABEYANCE PENDING APPELLANT'S CONTEMPORANEOUS 60(b) MOTION IN THE DISTRICT COURT

COMES NOW Petitioner-Appellant, Gregory Thompson, through undersigned counsel, and respectfully requests that the Court hold his appeal in abeyance pending the district court's disposition of his Fed.R.Civ.Pro. 60(b) motion, which is contemporaneously filed with this motion. In support hereof, Mr. Thompson would show as follows:

I. The Propriety of the Instant Motion

This Court is empowered to hold an appeal in abeyance pending resolution of a matter currently before another court. *See e.g. Eubanks v. Wilkinson*, 1989 WL 147107, slip op., p. 1 (6th Cir. 1991) (unpublished) (Attachment A).

II. The Propriety of Mr. Thompson's 60(b) Motion

Contemporaneously with this motion Mr. Thompson has filed a motion in the district court under Fed.R.Civ.Pro. 60(b), asking the district court for leave to supplement the record with Respondent's deposition of Dr. Faye Sultan, who examined Mr. Thompson and viewed his medical records, and Dr. Sultan's report dated July 22, 1999. (Attachment B). As regards Dr. Sultan's opinion of Mr. Thompson's mental status, the district court record does contain a summary of her conclusions in an expert disclosures pleading (R. 19) and an affidavit detailing Dr. Sultan's opinion regarding Mr. Thompson's mental health status in February 1999 (R. 34).

Mr. Thompson's Rule 60(b) motion is timely despite its filing during the pendency of the appeal. *See e.g. First National Bank of Salem, Ohio v. Hirsch*, 535 F.2d 343 (6th Cir. 1976); *Flynt v. Brownfield*, 726 F.Supp. 1106 (S.D.Ohio 1989).

III. The Reason for these Motions

In his Brief, Respondent has argued that Mr. Thompson did not present probative evidence of Mr. Thompson's mental health status at the time of the offense. Although the record does not presently contain Dr. Sultan's deposition and report, the record reflects the sworn testimony of Drs. Gillian Blair and Barry Crown on this issue. (R. 112; Memorandum of Law in Support of Petitioner's Application for Extraordinary Appeal of the Trial Court's Order Dated May 29, 1991, Denying Funds for Expert Assistance, Exhibit M, Affidavit of Dr. Blair, p. 2-4f; Apx. ___), (R. 5, Post-Conviction Transcript, Testimony of Dr. Blair, p. 199-259) and (R. 119; Deposition Testimony of Dr.

Crown, p. 4, 45; Apx. ___), respectively. Based on that testimony, Mr. Thompson believes he made a substantial showing of a genuine issue of material fact sufficient to defeat Respondent's summary judgment motion on this point. Moreover, the substance of Dr. Sultan's deposition and report was in front of the district court albeit not in the form of sworn testimony. (R. 19).

Nevertheless, in the event that the Court would ultimately require a greater showing than Mr. Thompson made in the district court via the testimony of Drs. Blair, Crown, and Sultan, Mr. Thompson seeks to present the transcript of Respondent's deposition of Dr. Sultan and her associated report. The transcript and report are attached to this Motion as Attachments C and D, respectively.

WHEREFORE Mr. Thompson respectfully requests that the Court hold his appeal in abeyance pending the resolution of his Rule 60(b) motion in the district court.

Respectfully submitted,

FEDERAL DEFENDER
SERVICES OF EASTERN
TENNESSEE, INC.

/s/ Dana C. Hansen
Dana C. Hansen
Assistant Federal
Community Defender
530 S. Gay Street, Suite 900
Knoxville, TN 37902
(865) 637-7979

Counsel for
Petitioner-Appellant

CERTIFICATE OF SERVICE

I, Dana C. Hansen, hereby certify that a true and correct copy of the foregoing Motion to Hold Appeal in Abeyance Pending Appellant's Contemporaneous 60(b) Motion in District Court has been served upon the appellee by placing a copy of same in the United States Mail, postage prepaid, addressed to:

Jennifer Smith, Esquire
Office of the Attorney General and Reporter
Criminal Justice Division
425 Fifth Avenue North
Cordell Hull Building, Second Floor
Nashville, TN 37243-0493

Glenn Pruden, Esquire
Office of the Attorney General and Reporter
Criminal Justice Division
425 Fifth Avenue North
Cordell Hull Building, Second Floor
Nashville, TN 37243-0493

Dated this the 1st day of March, 2001.

/s/ Dana C. Hansen
Dana C. Hansen

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE AT CHATTANOOGA

GREGORY THOMPSON, Petitioner,	)	
v.	)	**Case No: 4:98-CV-6** (Judge Edgar)
RICKY BELL, Warden, Respondent.	)	

MOTION UNDER FED.R.CIV.PRO. RULE 60(b)

COMES NOW Petitioner, Gregory Thompson, through undersigned counsel, pursuant to Fed.R.Civ.Pro. Rule 60(b) and respectfully requests that the Court relieve Mr. Thompson from the final order entered on February 17, 2000, for the purpose of entering an order to supplement the record with Respondent's deposition of Dr. Faye E. Sultan, PhD. and the accompanying report of Dr. Sultan. In support hereof, Mr. Thompson would show as follows:

I. The Propriety of the Instant Motion.

Fed.R.Civ.Pro. Rule 60(b) provides grounds for the instant motion for reasons of mistake, inadvertence, surprise, or excusable neglect within one year from the final order. The order entered in Mr. Thompson's case granting summary dismissal of his amended petition for writ of habeas corpus was entered on February 17, 2000. Therefore this motion, being filed within one year of the order, is timely. This motion is also timely despite the pendency of Mr. Thompson's appeal of the District Court's

order to the Sixth Circuit Court of Appeals. *See e.g. First National Bank of Salem, Ohio v. Hirsch*, 535 F.2d 343, 346 (6th Cir. 1976) (holding that when a case is on appeal "the party seeking to file a Rule 60(b) . . . should [] file[] that motion in the district court."); *Flynt v. Brownfield*, 726 F.Supp. 1106 (S.D.Ohio 1989).

II. Dr. Sultan's Involvement in this Case

Earlier in Mr. Thompson's District Court proceedings, Respondent took the deposition of Dr. Sultan. The district court record presently contains a summary of her conclusions in an expert disclosures pleading (R. 19) and an affidavit detailing her opinion regarding Mr. Thompson's mental health status in February 1999 (R. 34). Having examined Mr. Thompson and viewed his social and medical history, Dr. Sultan executed a report in addition to her testimony at Respondent's deposition. (Attachments A & B).

Although this Court denied Mr. Thompson's mental health related claims partially on procedural grounds, Dr. Sultan's deposition and report are important to the merits of the claims. With regards to the merits of Mr. Thompson's mental health related claims, he maintains that he made a sufficient showing of a genuine issue of material fact to overcome Respondent's summary judgment motion notwithstanding Dr. Sultan's opinions. However, Dr. Sultan's opinions certainly are directly relevant to the mental health related claims and should be considered by the Court. Counsel for Mr. Thompson engaged Dr. Sultan's services for the sole purpose of offering her opinions to support his constitutional claims. The failure of counsel to ensure that Dr. Sultan's opinions were filed in the record is a result of excusable neglect.

III. The Grounds for this Motion under Rule 60(b).

Fed.R.Civ.Pro. Rule 60(b) provides:

> Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. §§ 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished,

> and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

In support of this motion Mr. Thompson would show that Dr. Sultan's deposition and report are not included in the record of the District Court proceedings because of mistake, inadvertence, surprise, or excusable neglect. District Court counsel for Mr. Thompson, Stephen M. Kissinger, was under the mistaken belief that the evidence was in the record.[1] To the extent that counsel should have nonetheless known that Respondent had not placed Dr. Sultan's deposition and report in the record, counsel's failure to ascertain that fact and file the same himself was the result of excusable neglect. During the time period in question, counsel's office was in a state of turmoil and his caseload was excessively burdensome. As described fully in the attached affidavit of counsel, Stephen M. Kissinger, this state of disorder contributed to counsel's excusably negligent failure to realize that Dr. Sultan's deposition and report were not filed in the record. (Attachment C).

WHEREFORE Mr. Thompson respectfully requests that the Court order the record supplemented with the deposition and report of Dr. Faye E. Sultan, PhD. and that

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[1] Respondent's deposition of Dr. Crown and the accompanying report were placed in the record by Respondent (R. 91). Because Respondent had moved for costs incurred in, *inter alia*, hiring its own mental health expert, Dr. Blau, on the grounds that Dr. Blau's services were unnecessary because Petitioner had no expert opinions to support the mental health related allegations contained in the petition, counsel for Mr. Thompson was under the mistaken belief that Respondent had placed his deposition of Dr. Sultan and the report which Dr. Sultan had supplied to Respondent in the record.

the Court revisit its previous summary denial of Mr. Thompson's petition.

Respectfully submitted,

FEDERAL DEFENDER
SERVICES OF EASTERN
TENNESSEE, INC.

/s/ Dana C. Hansen
Dana C. Hansen
Assistant Federal Community
Defender
530 S. Gay Street, Suite 900
Knoxville, TN 37902
(865) 637-7979
B.P.R.# 19098
Counsel for Mr. Thompson

CERTIFICATE OF SERVICE

I, Dana C. Hansen, hereby certify that a true and correct copy of the foregoing Motion under Fed.R.Civ.Pro. Rule 60(b) served upon Respondent by placing a copy of same in the United States Mail, postage prepaid, addressed to:

Jennifer Smith, Esquire
Office of the Attorney General and Reporter
Criminal Justice Division
425 Fifth Avenue North
Cordell Hull Building, Second Floor
Nashville, TN 37243-0493

Glenn Pruden, Esquire
Office of the Attorney General and Reporter
Criminal Justice Division
425 Fifth Avenue North
Cordell Hull Building, Second Floor
Nashville, TN 37243-0493

Dated this the 1st day of March, 2001.

/s/ Dana C. Hansen
Dana C. Hansen

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at WINCHESTER

GREGORY THOMPSON, *Petitioner*,	)	No. 4:98-cv-006 *Edgar*
v.	)	
RICKY BELL, WARDEN, Riverbend Maximum Security Institution, *Respondent*.	)	

ORDER

(Filed Mar. 7, 2001)

This case is before the court on the motion of Gregory Thompson ("Thompson") to alter or amend judgment pursuant to FED.R.CIV.P. 60(b). [Court File No. 133]. On February 17, 2000, the Court entered a memorandum opinion and order [Court File Nos. 124, 125] granting the respondent's motion for summary judgment, and dismissing Thompson's petition for a writ of *habeas corpus* pursuant to 28 U.S.C. § 2254.

Petitioner requests the Court to relieve him from the final order entered on February 17, 2000, for the purpose of allowing him to supplement the record with respondent's deposition and accompanying record of Dr. Faye E. Sultan, PhD. Petitioner claims the instant motion is filed because of excusable neglect and is timely filed pursuant to Rule 60(b) provision that motions filed due to excusable neglect must be filed within one year from the final order. The Court finds the motion was filed more than one year after entry of final

judgment and as such is time-barred. *See Shugar v. Dallman*, 182 F.3d 918 (unpublished table decision), *available at* 1999 WL 397969. at *1 (6th Cir. June 2, 1999); FED. R. CIV.P. 60(b) and 6.

The Court notes the motion was signed by petitioner's counsel on March 1, 2001, and was filed on March 2, 2001. The motion was filed outside the one year time period. According to the Court's calculation, after reviewing the calendar, this motion was required to be filed no later than February 16, 2001, to be considered timely. *See* Rules 6 and 60(b) of the FEDERAL RULES OF CIVIL PROCEDURE.

Accordingly, petitioner's motion [Court File No. 133] is **DISMISSED** as **TIME-BARRED**.

It is SO ORDERED.

ENTER:

/s/ R. Allan Edgar
R. ALLAN EDGAR
CHIEF UNITED STATES
DISTRICT JUDGE

Case No: 00-5516

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ORDER

(Filed Mar. 21, 2001)

GREGORY THOMPSON

Petitioner-Appellant

v.

RICKY BELL, Warden

Respondent-Appellee

Upon consideration of the appellant's motion to hold this appeal in abeyance pending the 60(b) motion filed in the district court.

And further considering the response in opposition thereto, and it appearing the district court has ruled on the motion.

It is ORDERED that the motion be, and it hereby is DENIED.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

No. 00-5516

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GREGORY THOMPSON, Petitioner-Appellant, v. RICKY BELL, WARDEN, Respondent-Appellee.	)	ORDER (Filed Mar. 10, 2003)

BEFORE: SUHRHEINRICH, MOORE, and CLAY, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Clay would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

Case No: 00-5516

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

(Filed Mar. 24, 2003)

GREGORY THOMPSON

Petitioner-Appellant

v.

RICKY BELL, Warden

Respondent-Appellee

BEFORE: SUHRHEINRICH, MOORE and CLAY, Circuit Judges

Upon consideration of appellant's motion to stay mandate,

It is ORDERED that the mandate be stayed to allow appellant time to file a petition for a writ of certiorari, and thereafter until the Supreme Court disposes of the case, but shall promptly issue if the petition is not filed within ninety days from the date of final judgment by this court.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

Case No: 00-5516

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

(Filed Dec. 12, 2003)

GREGORY THOMPSON

Petitioner-Appellant

v.

RICKY BELL, Warden

Respondent-Appellee

BEFORE: SUHRHEINRICH, MOORE and CLAY, Circuit Judges

Upon consideration of appellant's motion to continue stay of mandate,

It is ORDERED that the mandate be stayed to allow appellant time to file a petition for rehearing from the denial of the writ of certiorari, and thereafter until the Supreme Court disposes of the case.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE V.
GREGORY THOMPSON

No. M1987-00067-SC-DPE-DD

ORDER

(Filed Feb. 25, 2004)

On January 21, 2004, the State filed a Motion to Set Execution Date for Gregory Thompson. The motion stated that Thompson had completed the standard three-tier appeals process and that an execution date should therefore be set under Tennessee Supreme Court rule 12.4(A). On February 2,2 004, Gregory Thompson filed a Response Opposing Motion to Set Execution Date and Request for a Certificate of Commutation. On February 9, 2004, the State filed a Reply to Thompson's Response.

The Response to the State's Motion alleged that an execution date should not be set because Thompson is severely mentally ill. Thompson also requested that this Court issue a certificate of commutation to the governor under Tenn. Code Ann. § 40-27-106 because Thompson's mental condition constitutes extenuating circumstances warranting commutation of his sentence to imprisonment for life. After careful review of the Response and the Request for commutation and the supporting documentation and the State's Reply, the Court concludes that under the principles announced in *Workman v. State*, 22 S.W.3d 807 (Tenn. 2000), Thompson has presented no extenuating circumstances warranting issuance of a

certificate of commutation. It is therefore ORDERED that the Request for a Certificate of commutation is hereby DENIED.

On February 2, 2004, Thompson also filed a Notice of Incompetency to Be Executed Claim, in which he raised the issue of his present competency to be executed and requested a competency hearing under *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999). Upon consideration of the Notice and supporting exhibits, it appears to the Court that Thompson has raised the issue of his present competency to be executed in accord with the procedures adopted by this Court in *Van Tran v. State*. It is hereby ORDERED that the issue is remanded to the Circuit court of Coffee County, where Thompson was originally tried and sentenced, for an expeditious determination of his present competency, including the initial determination of whether he has met the required threshold showing. These proceedings shall be conducted in accord with the procedures and time limits set forth in *Van Tran v. State*, which provides no more than fifty-five (55) calendar days for the conclusion of the trial court proceedings and the filing of an appeal in this Court.

In further appearing to the Court that a Motion for Appointment of Counsel was filed on January 30, 2004, the Court hereby appoints Michael J. Passino, 323 Union Street, Nashville, Tennessee 37201, as lead counsel to represent Thompson in the competency proceedings and in further proceedings in this Court in relation to the imminent execution. The Court also appoints the Office of the Public Defender for the Fourteenth Judicial District to serve as co-counsel in this matter.

Furthermore, after due consideration, the State's motion to set an execution date is GRANTED. It is hereby ORDERED, ADJUDGED and DECREED by this Court that the Warden of the Riverbend Maximum Security Institution, or his designee, shall execute the sentence of death as provided by law on the nineteenth day of August, 2004, unless otherwise ordered by this Court or other appropriate authority.

Counsel for Gregory Thompson shall provide a copy of any order staying execution of this order to the Office of the Clerk of the Appellate Court in Nashville. The Clerk shall expeditiously furnish a copy of any order of stay to the Warden of the Riverbend Maximum Security Institution.

PER CURIAM.

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE
Assigned on Briefs April 8, 2004

GREGORY THOMPSON v. STATE OF TENNESSEE

Direct Appeal from the Circuit Court for Coffee County
No. 20,014 Gerald L. Ewell, Sr., Judge

No. M1987-00067-SC-DPE-DD

(Filed May 12, 2004)

The appellant, death-row inmate Gregory Thompson, challenges the trial court's order denying a hearing on the issue of his competency to be executed. The trial court concluded that Thompson had failed to make a sufficient threshold showing. After carefully considering de novo the petition, the trial court's order, and the entire record in this cause, we conclude that the trial court correctly held that Thompson failed to make a threshold showing sufficient to warrant a hearing on his competence for execution. Accordingly, the judgment of the trial court is affirmed.

Judgment of the Circuit Court Affirmed

FRANK F. DROWOTA, III, C.J., delivered the opinion of the court, in which E. RILEY ANDERSON, JANICE M. HOLDER, and WILLIAM M. BARKER, JJ., joined. ADOLPHO A. BIRCH, JR., filed a separate concurring and dissenting opinion.

Michael J. Passino, Nashville, Tennessee, and B. Campbell Smoot, District Public Defender, Fourteenth Judicial

District, Tullahoma, Tennessee, for the appellant, Gregory Thompson.

Paul G. Summers, Attorney General and Reporter, Michael Moore, Solicitor General; Jennifer L. Smith, Assistant Attorney General; C. Michael Layne, District Attorney General, Fourteenth Judicial District, for the appellee, State of Tennessee.

OPINION

I. Procedural Background

In 1985, a Coffee County jury convicted the appellant, Gregory Thompson, of the first degree murder of Brenda Lane and imposed a sentence of death for this conviction. On direct appeal, this Court affirmed Thompson's conviction and sentence. *See State v. Thompson,* 768 S.W.2d 239 (Tenn. 1989). The United States Supreme Court denied Thompson's petition for a writ of certiorari. *See Thompson v. Tennessee,* 497 U.S. 1031 (1990).

Thereafter, Thompson sought post-conviction relief in the state courts, but after a hearing, the trial court denied relief. The Court of Criminal Appeals affirmed the trial court's judgment, and this Court denied Thompson's application for permission to appeal. *See Thompson v. State,* 958 S.W.2d 156 (Tenn. Crim. App.) *perm. app. denied* (Tenn. 1997).

In 1998, Thompson filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Tennessee. The district court granted summary judgment to the State and dismissed the petition. The United States Court of Appeals for the Sixth Circuit affirmed the district court's judgment. *See Thompson v.*

Bell, 315 F.3d 566 (6th Cir. 2003). On December 1, 2003, the United States Supreme Court again denied Thompson's petition for writ of certiorari and thereafter denied Thompson's petition for rehearing. *See Thompson v. Bell,* ___ U.S. ___, 124 S. Ct. 804 (2003), *reh'g denied* ___ U.S. ___, 124 S. Ct. 1162 (2004).

On January 21, 2004, one day after the United States Supreme Court denied rehearing, the State filed a motion requesting that this Court schedule Thompson's execution. In response to the motion, Thompson raised the issue of his present competency to be executed and requested a hearing pursuant to *Van Tran v. State,* 6 S.W.3d 257 (Tenn. 1999).[1]

On February 25, 2004, this Court set Thompson's execution for August 19, 2004, but also remanded the case to the Coffee County Circuit Court[2] for proceedings in accordance with *Van Tran,* including an initial determination of whether Thompson had made a threshold showing sufficient to warrant an evidentiary hearing on the issue of his present competency to be executed.

On March 1, 2004, Thompson filed a petition in the Circuit Court for Coffee County requesting a competency hearing. Attached to the petition were copies of records showing that, for almost twenty years, Thompson has been treated for mental illnesses. The attached records included

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[1] Characterizing Thompson's mental condition as an extenuating circumstance, the response also urged this Court to issue a certificate of commutation to the Governor under Tennessee Code Annotated section 40-27-106. This Court denied Thompson's request for issuance of a certificate of commutation.

[2] Thompson was initially tried and sentenced in the Coffee County Circuit Court.

reports of mental health professionals opining that Thompson is not presently competent to be executed and affidavits from both Thompson's attorney and investigator in the federal court proceedings. These affidavits describe Thompson's delusional beliefs about his upcoming execution.

The State filed a response to the petition, asserting that Thompson's submissions, even if true, did not create a genuine issue of disputed fact about Thompson's present incompetence for execution and thus did not meet the threshold requirements under *Van Tran* for an evidentiary hearing. On March 8, 2004, the trial court entered an order denying a hearing on the issue and concluding that the expert reports submitted by Thompson demonstrate that he presently is aware both of the fact that he has been sentenced to death for the murder of Brenda Lane and of the fact of his impending execution. Thompson filed an expedited appeal as required by *Van Tran,* 6 S.W.3d at 271-72. After carefully considering the record, we affirm the trial court's judgment dismissing the petition.

II. Threshold Issues

A. Public Defender's Motions to Withdraw

In the order of February 25, 2004, setting Thompson's execution date and remanding the case to the Coffee County Circuit Court, this Court appointed Michael J. Passino as lead counsel and the Office of the Public Defender for the Fourteenth Judicial District as co-counsel for Thompson. On March 1, 2004, B. Campbell Smoot, the District Public Defender for the Fourteenth Judicial District, filed both in this Court and in the trial court a "Motion to Withdraw as Counsel." As grounds for

withdrawal, the motion alleged that the Office's sole investigator, Jimmy Dale Conn, served as a lead investigator with the Coffee County Sheriff's Department during the investigation of Brenda Lane's murder and testified for the prosecution at Thompson's 1985 trial.

On March 8, 2004, the trial court denied Thompson's petition for failure to satisfy the threshold showing, but the trial court did not rule on the Public Defender's motion to withdraw. On March 9, 2004, this Court denied the Public Defender's motion to withdraw, stating:

> In our view, the motion is not well-taken. Mr. Conn's past involvement in Thompson's prosecution and trial does not disqualify the entire Office of the Public Defender for the Fourteenth Judicial District from proceedings to determine Thompson's discrete claim that he currently is not competent to be executed.

In this appeal Thompson argues that the trial court abused its discretion by failing to decide the motion to withdraw before ruling on Thompson's petition. In addition, Thompson asserts that the Public Defender should have been allowed to withdraw because an appearance of impropriety exists based upon the investigator's past employment with the prosecution during Thompson's original murder trial.

The State does not respond to the merits of Thompson's argument that withdrawal is appropriate. However, the State points out that this issue has been resolved by this Court, "notes with some concern" that the Office of the Attorney General has never been served with a copy of the motion, despite being listed on the certificate of service for the motion filed in the trial court, and states that the

Attorney General's Office was unaware of the basis of the motion until entry of this Court's order of March 9, 2004.

In our view, the trial court did not err in ruling upon the petition before deciding the motion to withdraw. Thompson provides no legal authority supporting his assertion that the trial court's decision constituted an abuse of discretion. Given that this Court appointed the Public Defender's Office, the trial court reasonably may have concluded that this Court should consider and dispose of the motion to withdraw. Furthermore, as the State points out, in light of this Court's order denying the motion to withdraw, Thompson's claim is moot insofar as he suggests that the motion established an appearance of impropriety and that the trial court erred by not granting the motion.

However, our inquiry is not ended. On March 17, 2004, the Public Defender moved this Court to reconsider its order of March 9, 2004, denying his motion to withdraw. This motion asserts that, because one of the three lawyers employed by the Public Defender's Office represented Thompson's co-defendant, Joanne MacNamara, a conflict of interest exists requiring withdrawal of the entire Public Defender's Office. Accordingly, the motion requests that this Court reconsider its March 9 order and allow the Public Defender's Office to withdraw.

We are of the opinion that this motion is not well-taken. The Public Defender's Office has been appointed as co-counsel in a proceeding to determine the discrete issue of Thompson's present competency to be executed. Thompson has completed the standard three-tier appeals process. Issues relating to the validity and correctness of Thompson's conviction and sentence have been litigated in

proceedings that are now final. The Public Defender's motion alleges neither a conflict of interest nor an appearance of impropriety requiring withdrawal. *See State v. White*, 114 S.W.3d 469, 476 (Tenn. 2003) (discussing conflict of interest and appearance of impropriety). Accordingly, the Public Defender's motion to reconsider is without merit and is denied.

B. Trial Judge's Recusal in Prior Case

On March 30, 2004, Thompson filed in this Court a "Motion to Vacate Trial Court Order, or, in the Alternative, Supplemental Brief in Support of Appeal." In this filing, Thompson contends that the order entered by Judge Gerald Ewell, the trial court judge who reviewed and denied Thompson's competency petition, is void because Judge Ewell recused himself from Thompson's post-conviction case. Thompson cites to cases from Tennessee and other jurisdictions holding that a trial judge who recuses himself or herself can take no further action in the case except necessary ministerial acts, such as transferring the case to another judge.[3] Under these authorities,

[3] Thompson relies upon the following authorities to support this proposition: *El Fenix de Puerto Rico v. The M/Y JOHANNY*, 36 F.3d 136, 142 (1st Cir. 1994); *Moody v. Simmons*, 858 F.2d 137, 143 (3d Cir. 1988); *Arnold v. Eastern Air Lines, Inc.*, 712 F.2d 899, 904 (4th Cir. 1983); *McCuin v. Texas Power & Light Co.*, 714 F.2d 1255, 1260-61 (5th Cir. 1983); *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1025 (9th Cir. 1982); *Stringer v. United States*, 233 F.2d 947, 948 (9th Cir. 1956); *Rohrbach v. ATT Nassau Metals Corp.*, 915 F. Supp. 712, 716 & n.5 (M.D. Pa. 1996); *Gubler v. Commission on Judicial Performance*, 688 P.2d 551, 567-68 (Cal. 1984); *Bolt v. Smith*, 594 So. 2d 864, 864 (Fla. Dist. Ct. App. 1992); *State v. Evans*, 371 S.E.2d 432, 433 (Ga. 1988), *overruled on other grounds by State v. Smith*, 485 S.E.2d 491 (Ga. 1997); *Ferguson v. Pony Express Courier Corp.*, 898 S.W.2d 128, 130

(Continued on following page)

Thompson asserts, any other orders of the recused judge are void and of no effect. Relying upon these authorities, Thompson asks this Court to vacate Judge Ewell's order and remand this case and designate another judge to hear the cause. Thompson asks that this Court appoint Judge Frank Clement, Jr., of the Court of Appeals, as a special judge because Judge Clement presided over Thompson's prior conservatorship proceedings.

On April 2, 2004, the State filed a response to Thompson's motion and/or supplemental brief. While the State does not dispute the proposition that a recusal order disables a judge from further adjudicative responsibility in the proceeding in which the order is entered, the State points out that the disqualification does not extend to subsequent independent proceedings unless some disqualifying factor exists in those proceedings as well. Relying upon *Van Tran* and this Court's order denying the Public Defender's motion to withdraw, the State contends that this competency proceeding is an independent action involving a discrete issue, not a continuation of any prior proceedings. *See Van Tran,* 6 S.W.3d at 264 (holding that post-conviction is not the appropriate avenue for litigating the issue of competency to be executed). We agree.

As the State points out, this Court in *Van Tran* instructed that the trial court in which the prisoner's

(Mo. Ct. App. 1995); *State ex rel. Johnson v. Mehan,* 731 S.W.2d 887, 888 (Mo. Ct. App. 1987); *Byrd v. Brown,* 613 S.W.2d 695, 699-700 (Mo. Ct. App. 1981); *Pueblo of Laguna v. Cillessen & Son, Inc.,* 682 P.2d 197, 199 (N.M. 1984); *State v. Nossaman,* 666 P.2d 1351, 1355 (Or. Ct. App. 1983), *abrogated on other grounds by Matter of Marriage of Benson,* 919 P.2d 496 (Or. Ct. App. 1996); *McElwee v. McElwee,* 911 S.W.2d 182, 186 (Tex. App. 1995).

original trial occurred is the proper forum for competency proceedings. 6 S.W.3d at 267. Furthermore, this Court later explained that, "[a] competency proceeding is sui generis. . . . " *Coe v. State,* 17 S.W.3d 193, 214 (Tenn. 2000). A competency proceeding is an action independent of the trial and post-conviction proceedings. *Id.* Finally, as the State emphasizes, a claim of ineffective assistance of counsel, the basis for Judge Ewell's recusal in the post-conviction case,[4] does not arise in this competency proceeding. In short, Judge Ewell's recusal in the post-conviction case does not disqualify him from presiding in other separate and independent proceedings involving Thompson, including this competency proceeding. *Cf. State v. Thornton,* 10 S.W.3d 229, 237 (Tenn.Crim.App.1999) (recognizing that a judge is not disqualified from hearing a case because the judge has knowledge of the facts of the case). Thompson's request to vacate the trial court's order and remand for designation of another judge is not well-taken and is denied.

[4] At Thompson's original trial and in the Rule 12 Report, Judge Ewell commended defense counsel's performance. In the post-conviction proceeding, Thompson filed a successful motion to disqualify Judge Ewell, arguing that his earlier remarks showed that he had "prejudged" the issue of ineffective assistance of counsel. There is no indication that Thompson challenged Judge Ewell's qualification in the trial court in the present case; therefore, the issue could be considered waived. *See Thompson v. State,* 958 S.W.2d 156, 172 (Tenn. Crim. App.), *perm. app. denied* (Tenn. 1997) (stating that the right to an impartial judge may be waived by lack of timely objection). Thompson explains his failure to raise the issue earlier by alleging that he had no formal notice that Judge Ewell had been assigned this case until entry of the order he now appeals.

C. Request for Stay – Inter-American Human Rights Commission

On April 2, 2004, Thompson filed a document entitled "Notice of Inter-American Human Rights Commission of the Organization of American States Request of the United States to Take Precautionary Measures to Prevent the State of Tennessee from Carrying out the Execution of Gregory Thompson Presently Scheduled for August 19, 2004 and Request for Stay of Execution." By this document, Thompson requests that this Court issue a stay of his execution based on a petition filed with the Inter-American Commission on Human Rights ("Commission"), asserting that his execution would violate the American Declaration of the Rights and Duties of Man ("Declaration") because of his mental illness and because of alleged "irregularities" in his criminal proceedings.[5] In his motion to this Court, Thompson asserts that the rules of the Commission allow the United States government two months to respond to his petition, and, assuming the United States government responds at the end of its allotted time, a stay is necessary to allow the Commission sufficient time to examine Thompson's case.

As a general rule, international agreements, even those benefitting private parties, do not create rights privately enforceable in domestic courts. *United States v. Emuegbunam*, 268 F.3d 377, 389, 392 (6th Cir. 2001) (holding that the Vienna Convention, and in particular

[5] The State points out that Thompson's petition to the Commission was submitted *ex parte* and that information regarding the petition derives from a letter Ariel Dulitzky directed to attorneys Michael J. Passino and Marjorie Bristol, dated March 31, 2004, noting receipt by the Commission of Thompson's petition.

Article 36, does not create in a detained foreign national a right of consular access). "In fact, courts presume that the rights created by an international treaty belong to a state and that a private individual cannot enforce them." *Id.* at 389. There are, of course, exceptions to this rule, but an international agreement can be considered to create judicially-enforceable private rights only where such rights are contemplated in the agreement itself. *Garza v. Lappin*, 253 F.3d 918, 924 (7th Cir. 2001) (citing *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373 (7th Cir. 1985)). The general rule that a treaty creates no rights privately enforceable in domestic courts clearly applies to Thompson's motion.

In 1951, the United States ratified the Charter of the Organization of American States ("OAS").[6] This treaty authorized creation of the Commission. *See Garza*, 253 F.3d at 924 (citing OAS Charter (Amended) Article 112, 21 U.S.T. 607). The Declaration, under which Thompson invokes the Commission's authority, creates no judicially cognizable rights for individuals. Rather, it is an aspirational document, imposing no enforceable obligations on any member nation of the Organization of American States. *Garza*, 253 F.3d at 923 (stating that the Declaration is an aspirational document that, in itself, creates no directly enforceable rights). The OAS Charter authorized the creation of the Inter-American Commission on Human Rights, which serves as an autonomous consultive organ to the OAS on human rights matters and a convention to determine the structure, competence, and procedure of the Commission. The resulting American Convention on

[6] The treaty was ratified by the United States as amended in 1968. *Garza*, 253 F.3d at 924.

Human Rights ("American Convention") accomplished that purpose and, as well, created an Inter-American Court of Human Rights, whose decisions are potentially binding on member nations. *Garza,* 253 F.3d at 925. While the United States has signed and ratified the OAS Charter, the United States has *not* ratified the American Convention. *Id.; see also Stanford v. Kentucky,* 492 U.S. 361, 390 n.10 (1989) (Brennan, J., dissenting) (noting that Article 4(5) of the American Convention on Human Rights has been signed, but not ratified, by the United States).[7] Consequently, the American Convention does not qualify as a "treaty" of the United States and creates neither obligations binding on the United States government nor rights privately enforceable in domestic courts. *See Garza,* 253 F.3d at 925.

Indeed, the Commission's governing document, the Statute of the Inter-American Commission on Human Rights, provides separate procedures for processing complaints against nations that have ratified the Convention and those, like the United States, that have not ratified the Convention. Under the Commission's governing statute, the Commission's authority as to complaints, such as Thompson's, against non-ratifying nations is limited to making *recommendations* for what it might consider more effective observance of human rights. *Id.* As to nations that have ratified the American Convention, the Commission's powers are extended to include action before the Inter-American Court of Human Rights. Under neither circumstance, however, does the Commission's authority

[7] See http://www.oas.org/main/english/. for a copy of the OAS, an explanation of the powers and duties of the Commission, and a list of nations that have ratified the American Convention.

as to member nations exceed simply making non-binding recommendations in response to complaints of human rights violations. *Id.* The Commission's request for precautionary measures in response to Thompson's petition, then, is simply a "request" which has no binding effect on either the United States government or this Court. *See Garza,* 253 F.3d at 925 (stating that the United States has not obligated itself to be bound by the Commission's decisions); *Roach v. Aiken,* 781 F.2d 379, 380 (4th Cir. 1986) (denying a stay of execution where no treaty obligation would require enforcement of a decision of the Commission); *Jamison v. Collins,* 100 F. Supp. 2d 647, 766 (S.D. Ohio 2000) (same); *see also Buell v. Mitchell,* 274 F.3d 337 (6th Cir. 2001) (stating that the American Declaration of the Rights and Duties of Man is not binding on the courts of the United States). As the Seventh Circuit recognized, "non-binding recommendations to a government on how to conduct its affairs would appear to be addressed to the executive and legislative branches of the government, not to the courts." *Garza,* 253 F.3d at 926. In short, the Commission's decisions are in no way binding on domestic judicial proceedings. Thompson's motion requesting a stay of execution to allow the Commission time to consider his petition therefore is denied. *See Philip R. Workman v. State,* No. M1999-1334-SC-DPE-PD, Order (Tenn. filed Mar. 29, 2001) (denying death-row inmate's request to stay his execution pending resolution of his petition before the Inter-American Commission on Human Rights); *Workman v. Sundquist,* 135 F. Supp. 2d 871, 872 (M.D. Tenn. 2001) (concluding that death-row inmate was not entitled to temporary restraining order staying execution where inmate could not show decision of Inter-American Commission is enforceable in courts of the United States).

III. Competency Petition

Having resolved these threshold issues, we must next consider whether the trial court erred in concluding that Thompson had failed to make a threshold showing sufficient to warrant a hearing on his competency petition. Under Tennessee law, a prisoner is not competent to be executed if the prisoner lacks the mental capacity to understand the fact of the impending execution and the reason for it. *Van Tran,* 6 S.W.3d at 266. A prisoner is not entitled to a hearing on the issue of competency unless the prisoner makes a threshold showing that a genuine, disputed issue exists regarding the prisoner's present competency. *Id.* at 268; *see also Coe,* 17 S.W.3d at 211. As this Court explained in *Van Tran,* the rationale underlying the threshold requirement is twofold. First, death penalty litigation engenders the potential for false claims and intentional delay. The issue of incompetency is particularly troublesome because this issue can be repeatedly litigated by the same prisoner until the very moment of execution with the prisoner repeatedly claiming the onset of incompetence sometime after the previous determination to the contrary. *See Van Tran,* 6 S.W.3d at 270 (citing *Ford v. Wainwright,* 477 U.S. 399, 429 (1986) (O'Connor, J., concurring in the result in part, dissenting in part)). Second, the prisoner is presumed to be competent because the prisoner is asserting incompetency "following a trial and sentencing hearing at which his sanity was either conceded or determined by the court." *Van Tran,* 6 S.W.3d at 271 n.15 (quoting *Ford,* 477 U.S. at 426 n.6 (Powell, J., concurring)) (citing *State v. Harris,* 789 P.2d 60, 67 (Wash. 1990); Ariz. Rev. Stat. Ann. § 13-4022(E) (West Supp. 1998); Ohio Rev. Code Ann. § 2949.29(c) (Anderson Supp. 1998)).

Given these compelling rationales, requiring a prisoner to make a substantial threshold showing is both necessary and appropriate. Indeed, as this Court emphasized in *Van Tran*:

> [w]ithout a substantial threshold requirement, the eleventh hour petitions asserting insanity would be encouraged because the death row petitioner would know that the mere filing of a conclusory petition would result in a stay of execution. Placing no initial burden on the petitioner is an invitation to specious insanity claims.

Van Tran, 6 S.W.3d at 269 (quoting *Harris,* 789 P.2d at 69). Thus, the prisoner bears the burden of making a threshold showing that a genuine, disputed issue exists regarding the prisoner's present competency.

> This burden may be met by the submission of affidavits, depositions, medical reports, or other credible evidence sufficient to demonstrate that there exists a genuine question regarding petitioner's present competency. In most circumstances, the affidavits, depositions, or medical reports attached to the prisoner's petition should be from psychiatrists, psychologists, or other mental health professionals. If the trial court is satisfied there exists a genuine disputed issue regarding the prisoner's present competency, then a hearing should be held.

Van Tran, 6 S.W.3d at 269 (citations omitted). Proof sufficient to meet this threshold showing must relate to *present* incompetency; therefore, crucial to this showing is evidence from recent mental evaluations or recent observations of the prisoner. *Id.; see also Coe,* 17 S.W.3d at 212. The threshold is thus not satisfied by evidence of the

prisoner's distant past incompetency. *Id.* In addition, unsupported conclusory assertions will be insufficient to satisfy the required threshold showing. *Id.* Allegations that the prisoner is mentally ill are not sufficient to meet the threshold showing requirement. *See Coe,* 17 S.W.3d at 221 (stating that "the existence of a mental disorder does not automatically translate into a finding of incompetency to be executed"). Unless the prisoner submits materials that raise genuine disputed issues about the prisoner's mental capacity to understand or be aware of the fact of the impending execution and the reason for it, the threshold showing has not been met. *Id.* at 220. Furthermore, the prisoner's unusual views about what occurs after the prisoner's execution "are not pertinent to the question of [the prisoner's] competency because they do not impede [the prisoner's] ability to understand the fact of [the prisoner's] impending execution and the reason for it." *Id.* at 222. Indeed, as this Court and other courts have recognized, "what occurs beyond death is not a subject on which any witness can be qualified as an expert, and every person is free to believe as he or she may wish on that subject." *Id.* at 222.

Finally, this Court will review de novo the trial court's determination that Thompson failed to establish a genuine issue regarding his present competency. The trial court's decision at the threshold showing stage generally involves no factual determinations entitled to deferential review. Unlike *Coe,* the trial court in this case did not observe witnesses and make credibility determinations. Indeed, the trial court in this case reviewed affidavits and other written submissions before determining that Thompson had failed to establish a genuine issue as to his present competency to be executed. Therefore, much like the

standard of review applied when reviewing a lower court decision granting summary judgment, the appropriate standard of review in this case is de novo, with no presumption of correctness afforded the trial court's decision. Whether a genuine issue exists is a question of law.[8] *See, e.g., Guy v. Mut. of Omaha Ins. Co.,* 79 S.W.3d 528, 534 (Tenn. 2002) (applying de novo review in the summary judgment context). *Cf. Van Tran,* 6 S.W.3d at 272 (stating that procedural issues are reviewed de novo). Likewise, the appropriate standard of appellate review in this context is de novo with no presumption of correctness afforded the trial court's determination.[9]

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[8] In the summary judgment context, the movant bears the burden of establishing that a trial is not necessary because no genuine issue of disputed material fact exists. Here, the prisoner bears the burden of establishing that a hearing is necessary because genuine issues of disputed fact exist regarding the prisoner's competency.

[9] Our conclusion that de novo review is the appropriate standard should not be viewed as an acceptance of Thompson's assertion that the trial court's order "does not reflect independent judicial judgment." Thompson's claim that the trial court improperly delegated its obligation to make findings of fact and conclusions of law to the State, thereby depriving him of procedural due process and a neutral and independent adjudication, is based largely upon the following statement in the order: "In this case many of the assertions made by the State in response to said petition came to the mind of the undersigned while reading the petition, and the State's response generally enunciates the opinion and findings of this Court." Thompson equates this remark with the disfavored procedure of a trial court having counsel for the prevailing party prepare the court's order or findings of fact and further argues that because the trial court improperly "adopted" the State's response, this Court should review the case de novo and not afford a presumption of correctness to the trial court's findings. In our view, Thompson's claim that the trial court's order "does not reflect independent judicial judgment" is belied by the very statement on which he relies. The fact that, while reading the petition, the trial court reached the same conclusions as the positions advanced by the State and

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Our holding in this regard is a clarification of that portion of *Van Tran* which instructed that, if a trial court determines the prisoner has failed to meet the required threshold showing, "the trial court shall enter an order denying the petition, which shall include written detailed findings of fact and conclusions of law." *Van Tran,* 6 S.W.3d at 269. The trial court need only include detailed findings of fact in the order if the trial court actually makes findings of fact. Where as here the trial court concludes that the prisoner's written submissions fail to meet the threshold showing required for a hearing, findings of fact are not necessary.

Having articulated the governing legal standards, we next must apply those standards to Thompson's petition and supporting documents.

IV. Thompson's Petition and Supporting Documents

To support his claim of incompetence in this case, Thompson attached to his petition eighteen exhibits, consisting of records detailing Thompson's history of mental illness while in custody of the Tennessee Department of Correction for the murder of Brenda Lane; materials regarding the appointment and later termination of a

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ultimately ruled adversely to Thompson provides no basis for a determination of judicial bias or lack of independent judicial judgment. *See, e.g., Alley v. State,* 882 S.W.2d 810, 821 (Tenn. Crim. App. 1994) (stating that a ruling adverse to a party's interest is not sufficient to establish judicial bias). While the order is brief, it is clear that the trial court independently reached its decision and drafted the order. Though we have concluded that de novo review is the appropriate standard in the context of this case, we reject Thompson's charge that the trial court failed to exercise independent judicial judgment. This claim is without merit.

conservator to supervise Thompson's medication; affidavits from Thompson's attorney and investigator in the federal proceedings; and the reports and curricula vitae of three mental health professionals, who have examined Thompson within the last three months and opine that he is incompetent to be executed.

Many of the exhibits, particularly the records relating Thompson's history of mental illness, are stale and thus not relevant to the issue of *present* competency. *See Van Tran,* 6 S.W.3d at 269. Nevertheless, Thompson asserts that these records reflect delusional beliefs about his personal identity ("he is God and in control of the world" and "he is a wealthy songwriter"), about the State's ability to carry out his death sentence ("he believes, despite his death sentence, that he will be released from prison . . . because Big Bird or God is on his side") and/or the likelihood that his execution will occur ("he will be released from prison . . . simply because that is what is going to happen"), and demonstrate that he lacks the mental capacity to be executed. We disagree.

Approximately eight months ago, at the request of Thompson's current counsel, the Davidson County Probate Court terminated a conservatorship for Thompson that had been in place since March 2001. In terminating the conservatorship, then Probate Court Judge Frank G. Clement, Jr., found that Thompson has some insight into his mental illness, that he voluntarily takes his medication, and that he is not in need of the supervision or

assistance of a conservator.[10] Judge Clement stated as follows at the conclusion of the termination hearing:

> [I]n the two plus years that Frank Freemon has been conservator – I'm extremely pleased that he was there, but he's basically been unnecessary, which is pretty compelling in itself. . . . I'm impressed with the fact that, as Mr. Freemon indicated today, they hand him [Thompson] his meds . . . and he takes them voluntarily. With that in mind, I believe the conservator is unnecessary.

Moreover, review of the exhibits that are prison records relating to Thompson's mental health history illustrates that Thompson remains aware that he has been sentenced to death for the murder of Brenda Lane. For example, on September 24, 1998, Thompson was interviewed by a prison psychiatrist. During the interview, Thompson recounted that he had seen a psychiatrist while in the Navy. According to the prison psychiatrist, "Mr. Thompson [said] 'the psychiatrist he saw in the military should have done more tests and *he would not have ended up on death row.*'" (Emphasis added.) According to a prison nurse, Thompson claimed, on January 20, 2001, that an officer at the prison "is actually a woman he is suppose [sic] to have murdered. That she is that person,

[10] Incompetence is not the standard for appointment of a conservator under Tennessee law. In March 2001, Thompson was found to be "disabled" within the meaning of Tennessee Code Annotated section 34-1-101(7) and in need of the protection and assistance of a conservator. A "disabled person" is defined by the conservatorship statute as "any person eighteen (18) years of age or older determined by the court to be in need of partial or full supervision, protection and assistance by reason of mental illness, physical illness or injury, developmental disability or other mental or physical incapacity." Tenn. Code Ann. § 34-1-101(7) (2001).

right age, right build, right hair 'not many people have black-red hair.' Inmate relates that since she is alive and working here *he could not have murdered her and he should not be on death row for something he didn't do.*" (Emphasis added.) Again, on September 6, 2002, Thompson questioned a prison psychiatrist, "I'd like to know when I'm getting out of here." When the psychiatrist asked, "How long is your sentence Greg?" Thompson answered, "*Death.*" (Emphasis added.) Contrary to Thompson's assertions, therefore, records from the conservatorship proceeding and from the prison do not establish a genuine issue of disputed fact regarding his competency to be executed.

Thompson also submitted the reports of three mental health experts who opined that he presently is not competent to be executed. Although all of these reports indicate that Thompson is suffering from mental illness, described as schizophrenia, chronic undifferentiated type, the reports do not present facts indicating that Thompson is unaware of his impending execution and the reason for it. In fact, as the State points out, parts of these reports support the opposite conclusion, that Thompson presently meets the standard of competency for execution.

Although each of the experts ultimately opines that Thompson is presently incompetent to be executed, these opinions, standing alone with no underlying factual bases, are not sufficient to give rise to a genuine issue regarding Thompson's present competency. Significantly, the reports of all three experts either explicitly, or as part of the factual bases underlying their opinions, illustrate that Thompson presently is aware of the fact of his impending execution for the murder of Brenda Lane.

In a report dated January 28, 2004, Dr. John S. Rabun, a psychiatrist, states that, when questioned about the reason for his incarceration, Thompson "readily admitted that he 'killed Brenda Lane.'" Thompson further discussed his trial in Coffee County with Dr. Rabun, stating that he had been convicted of first-degree murder and, during the "second phase," had been sentenced to "death." Dr. Rabun includes in his report four factors that suggest Thompson is competent to be executed:

> (1) Mr. Thompson told the examiner that executions in Tennessee are by "lethal injection or the electric chair," suggesting that he understands how the death penalty is carried out;
>
> (2) Mr. Thompson told the examiner that he was convicted in 1985 of killing the victim of the instant matter, suggesting that he understands the reason for his death sentence;
>
> (3) Mr. Thompson told the examiner that he received the death penalty during the "second phase" of his trial, suggesting that he understands the penalty he received; and
>
> (4) Although Mr. Thompson did not know anything about the current appeal process in his case, he said that he knew the State of Tennessee was seeking to execute him.

Dr. Rabun's ultimate opinion of incompetence is based upon Thompson's alleged delusional beliefs about: (1) his personal status and identity;[11] (2) the State's ability to

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[11] According to Dr. Rabun's report Thompson believes he: "is actually a 'lieutenant' in the navy"; buried "one million dollars, two gold bars, one Grammy award, and two stock certificates from Quaker State

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carry out the death sentence;[12] (3) the likelihood that the sentence will actually be carried out;[13] and, (4) what will happen to him upon execution.[14] This Court previously rejected a prisoner's reliance on such delusional or unorthodox beliefs as irrelevant to the question of competency for execution. *Coe,* 17 S.W.3d at 220-22 (declining to overturn the trial court's decision finding Coe competent despite Coe's belief that at his execution he would be in another place in the same body, would visit his ex-wife and child, and would perhaps temporarily be a ball of fire that speaks to people).

Moreover, Dr. Rabun's report, recounting the substance of an interview with Thompson as recently as January 19, 2004, clearly demonstrates Thompson's awareness of the details of the murder of Brenda Lane, the

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and Apple Computers near a church in Georgia"; and "made up the Klingons so that young people would have a strong black person in TV."

[12] According to Dr. Rabun's report, Thompson believes that even though the murder happened within the State of Tennessee, he is "federal property" due to his "officer" status in the Navy, and the State cannot execute him.

[13] According to Dr. Rabun's report, Thompson believes that his military record with the "Secretary of the Navy" as a "lieutenant" will allow for a "mistrial" and that he will be "discharged" and can return to live in Hawaii. Dr. Rabun also commented that Thompson holds "magical, near child-like reasoning about possible avenues of appeal in the present case."

[14] According to Dr. Rabun, Thompson believes he is a Klingon and that his soul will go to Valhalla. Klingons are fictional warrior aliens who appear on the "Star Trek" television series and movies. *See* http://www.startrek.com/startrek/view/library/aliens/article/70638.html (last visited May 10, 2004). The Merriam-Webster Online Dictionary defines Valhalla as "the great hall in Norse mythology where the souls of heroes slain in battle are received." *See* http://www.m-w.com/cgi-bin/dictionary?va=Valhalla (last visited May 10, 2004).

trial and sentencing proceedings resulting in his current death sentence, and further, that he accepts full responsibility for his actions. The report states as follows:

> *Committing Offense:* Mr. Thompson was questioned about the reason for his incarceration. Mr. Thompson readily admitted that he "killed Brenda Lane." He noted that he and a female friend had an "idea" to go to Tennessee. He was then living in Georgia, estimating that he returned to Georgia in 1984. He told the examiner that he and his female friend drove to Tennessee, and he kidnapped "Brenda Lane" who worked at a "Methodist newspaper." He again reported that he "killed Brenda Lane." In other words, he accepted responsibility for his actions. At no point in either interview with the examiner did he try and claim he was innocent or allege that another party committed the offense. Subsequently, he discussed his trial in Coffee County, Tennessee. He indicated that he was convicted of "First Degree Murder" and during the "second phase" was sentenced to "death."

In short, Dr. Rabun's report fails to satisfy the threshold showing for a hearing on competency. Indeed, its detailed description of Thompson's awareness of the murder of Brenda Lane, his sentence of death, and his impending execution, undercuts, rather than supports, his claim of incompetence. *See Coe,* 17 S.W.3d at 221-222 ("The appellant's comments asserting his innocence and contending that the purpose of his execution is to prevent the truth from coming out actually demonstrate that he understands the fact of his impending execution and the reason for it."); *Cf. Schornhorst ex rel. Fleenor v. Anderson,* 77 F. Supp. 2d 944, 955 (S.D. Ind. 1999) (stating that the prisoner considered his execution unfair, but finding that

the prisoner had failed to make a threshold showing of incompetency).

The next report is that of Dr. George W. Woods, Jr., a psychiatrist, who evaluated Thompson on February 17, 2004, for three hours. In a report dated February 27, 2004, Dr. Woods diagnoses Thompson as suffering from schizophrenia, undifferentiated type, and opines that Thompson is "currently incompetent to be executed." Dr. Woods reported that Thompson suffers from bizarre delusions and perceptual disorders such as auditory hallucinations and that Thompson believes he cannot die and will stay alive for two years even if he is executed. Thompson also told Dr. Woods that, once it is acknowledged that he is a lieutenant in the Navy, he will receive a trial before a military tribunal and be exonerated. According to Dr. Woods, Thompson also claims that he has a fortune in gold bullion buried in his hometown in Georgia, denies that he will die from electrocution, and says that he has been electrocuted before and plans to go either to "Gangster's Paradise" or to Hawaii after his death. Dr. Woods concluded that, although not mentally retarded, Thompson's mental state is analogous to that of mental retardation and that the same reasons given by the United States Supreme Court in *Atkins v. Virginia,* 536 U.S. 304 (2002), to explain why execution of the mentally retarded is unconstitutional, apply equally to Thompson. Although Dr. Woods relates Thompson's delusional beliefs, his report fails to address directly the critical inquiry under *Van Tran* – whether Thompson is aware of the fact of his

impending execution and the reason for it.[15] To the contrary, Dr. Woods's report indicates that Thompson is aware of the fact of his impending execution and the reason for it. For example, the report states:

> Mr. Thompson believes that he can not die, and there will be a two year period in which he will stay alive, even if he were *executed.* He also believes *that he will not be executed* since he was a lieutenant in the navy, and once this information is acknowledged, *his current conviction* will be thrown out and he will receive a military tribunal which will exonerate him. Thompson further relates that *the electric chair is his method of choice.*

(Emphasis added.) Again, Thompson's beliefs about what will occur after his death or dissatisfaction with his conviction and sentence do not raise genuine issues regarding his competency for execution unless those beliefs preclude Thompson from being aware of the fact of his impending execution and the reason for it. Dr. Woods's report fails to illustrate that Thompson's beliefs pose such an impediment and therefore fails tc establish a genuine issue under *Van Tran* regarding Thompson's present competency.

The third report was provided by Dr. Faye E. Sultan, a psychologist, who examined Thompson on January 28, 2004. Dr. Sultan stated that "in a non-medicated state, Mr. Thompson is floridly psychotic" and unaware of his surroundings. Dr. Sultan opined that Thompson is not

[15] Dr. Woods's report fails to set forth any definition or guiding authority that indicates his opinion is based upon the appropriate legal standard for competence under Tennessee law.

competent to be executed "in a non-medicated state." Currently, however, as Dr. Sultan acknowledges, Thompson participates in a regular regimen of medications. Dr. Sultan admits that Thompson knows he has been sentenced to death, but she points out that Thompson holds the delusional beliefs that it is impossible for him to be executed or for the execution to occur. Thompson instead talks about leaving prison and returning to Hawaii or to his family.

At best, Dr. Sultan's affidavit establishes that Thompson may become incompetent at some point in the future if he deviates from his current medication regimen, an allegation that has been rejected by this Court on more than one occasion as insufficient to trigger competency proceedings under *Van Tran*. *See Coe,* 17 S.W.3d at 221 n.5 (stating that the issue in a *Van Tran* proceeding is the prisoner's present competency to be executed); *see also Abu-Ali Abdur'Rahman v. State,* No. M1988-00026-SC-DPE-PD, Order (Tenn. filed Jan. 15, 2002) (stating that allegations of future incompetency are insufficient to delay execution date or obtain hearing on competency to be executed); *State v. Sedley Alley,* No. M1991-00019-SC-DPE-DD, Order (Tenn. filed Jan. 16, 2004) (finding allegation that prisoner will become incompetent at or around the time of execution insufficient to trigger *Van Tran* proceedings). Thus, like the reports of Dr. Rabun and Dr. Woods, Dr. Sultan's report is insufficient to raise a genuine issue regarding Thompson's present competency to be executed. The expert reports indicate, rather, that Thompson is aware of the fact of his impending execution and the reason for it.

The final exhibits attached to Thompson's petition are affidavits of Dana C. Hansen Chavis, an attorney with the

Federal Defenders Services of Eastern Tennessee, Incorporated, ("Federal Defender Services"), who has represented Thompson in the past,[16] and Michael R. Chavis, an investigator with Federal Defender Services. These affidavits recount conversations Dana C. Hansen Chavis and Michael R. Chavis had with Thompson on January 22, 2004, and February 27, 2004, respectively. The affidavit of Dana C. Hansen Chavis relates that, when she advised Thompson the State had filed a motion to set his execution date, Thompson responded: "Don't worry. God told me yesterday I'm not going to die. . . . I'm either going to Hawaii or I'm going back home." Michael R. Chavis's affidavit relates that when he informed Thompson that his execution date had been set by the order of February 25, 2004, Thompson replied: "It's more important than ever that you find my money and uniform." Both Dana C. Hansen Chavis and Michael Chavis opined that Thompson currently is not competent to be executed.

While Thompson's petition and supporting exhibits establish that he is mentally ill, these filings do not raise a genuine issue regarding Thompson's competency. In fact,

[16] The State asserts in its response that, by offering personal testimony on a contested issue, Dana C. Hansen Chavis has disqualified herself and Federal Defender Services from representing Thompson in this matter. The State also says that the Federal Defender Services should be disqualified because its appearance in this proceeding exceeds the scope of its authority under federal law. The State points out that no federal proceedings are presently pending under which a federal judge could authorize Federal Defender Services to represent Thompson in ancillary state-court matters. We need not address these assertions, however, because this Court did not appoint Dana C. Hansen Chavis to represent Thompson in these proceedings but instead appointed Michael Passino and the Public Defender for the Fourteenth Judicial District.

the petition and supporting exhibits undercut Thompson's claim that he currently is not competent to be executed. Under *Van Tran* and *Coe,* Thompson need only understand or be aware of the *fact* of his impending execution and the *reason* for it. *Van Tran,* 6 S.W.3d at 266; *Coe* 17 S.W.3d at 220 (emphasis added). The reports of Thompson's mental health experts show that, despite any delusions, Thompson understands that he is going to be executed for murdering Brenda Lane. As previously stated, the fact that a prisoner may suffer from a mental disease or disorder does not automatically equate to a finding of incompetency to be executed. *Coe,* 17 S.W.3d at 221. Furthermore, while Thompson professes unorthodox beliefs about what will happen *after* his execution, these beliefs do not vitiate Thompson's awareness of the fact of his execution and the reason for it. As previously stated, a prisoner's delusional or unorthodox beliefs about what may occur upon death or the prisoner's irrational beliefs about the legal processes and/or the ability of the State to carry out the execution are not pertinent to the question of competency because they do not impede the prisoner's ability to understand the *fact* of the impending execution and the *reason* for it. *See Coe,* 17 S.W.3d at 221-22 (citing *Weeks v. Jones,* 100 F.3d 124, 125 n.3 (11th Cir. 1996) (finding that the prisoner's belief that he would be transformed into a giant tortoise upon his death and rule the universe did not render him incompetent to be executed); *Garrett v. Collins,* 951 F.2d 57, 58 (5th Cir. 1992) (finding the prisoner competent to be executed despite his belief that his deceased aunt would save him through supernatural intervention)). The trial court did not err in concluding that Thompson failed to meet the threshold showing for an evidentiary hearing by establishing that there are genuine issues regarding his present competency to be executed.

Furthermore, Thompson's assertion that the trial court misapplied the law in making its determination is without merit. Thompson points to the trial court's reference to the "high threshold" for obtaining an evidentiary hearing, which he says conflicts with *Van Tran's* simple "threshold showing." Relying upon this language, Thompson claims that the trial court imposed a higher burden than contemplated by *Van Tran.* However, we are convinced that the trial court applied the proper standard in denying Thompson's request for a hearing. Moreover, this Court certainly has applied the proper standard in reviewing de novo Thompson's petition and supporting exhibits and reaches the same conclusion, that Thompson failed to make the required threshold showing. This issue therefore is without merit.

Thompson also argues that the trial court applied an incorrect standard for competence by omitting the "mental capacity component" of *Van Tran.* He contends that the appropriate standard for competence requires that a prisoner have both a rational and factual understanding of the punishment he is about to suffer and the reason for it. According to Thompson, "the prisoner must understand that he will die in the near future (and what it means to die), and that the reason the State will kill him is to punish him for what he did." In addition, Thompson faults the trial court for not applying the "more rigorous" common law assistance standard for competence articulated in *Jordan v. State,* 124 Tenn. 81, 135 S.W. 327 (1911), and argues that this Court should hold that a prisoner is not competent to be executed unless the prisoner is "aware of the penalty and its purpose [and possesses the ability] to assist in his or her own defense."

Initially we note that this Court expressly rejected the more stringent *Jordan* assistance test as the standard for competency to be executed, observing that neither the Eighth Amendment to the United States Constitution nor precedent of this Court requires the stricter standard. *Van Tran,* 6 S.W.3d at 266 ("We agree with Justice Powell that in a proceeding to determine competency to be executed, only those who are unaware of the punishment they are about to suffer and the reason they are to suffer it are entitled to a reprieve").

Moreover, in *Coe,* this Court refused to engraft upon the term "awareness," a highly technical meaning. Pointing to the prisoner's delusional beliefs about what would happen at the moment of his death ("he will just simply be in another place in the same body, will visit his ex-wife and child" and "when he is given the needle . . . he will then be out of prison and he will be walking around"), Coe argued that, although he had an "awareness" of his impending execution, he lacked an "understanding" of it. *Coe,* 17 S.W.3d at 219-20. This Court instructed, however, that for purposes of determining competency, the terms "awareness" and "understanding" should be given their ordinary, common meanings, not the technical meanings these words may have in the field of psychology or psychiatry. Thus, we concluded that the requirements of *Van Tran* were satisfied because the record clearly reflected Coe "knows that he was sentenced to death for murdering a young girl." *Coe,* 17 S.W.3d at 221. Simply put, a prisoner need only be aware of "the *fact* of his or her impending execution and the *reason* for it" to satisfy the competency required for execution of the death sentence. *Id.* at 220 (emphasis added). The trial court and this Court on de novo review have properly applied this standard in

concluding that Thompson failed to establish a genuine issue regarding his competency and in denying his petition without a hearing.

V. Conclusion

For all these reasons, and after fully considering the entire record in this cause, the trial court's judgment dismissing Thompson's petition is affirmed. This opinion is not subject to rehearing under Tennessee Rule of Appellate Procedure 39, and the Clerk is directed to certify this opinion as final and immediately issue the mandate. As provided by this Court's order of February 25, 2004, the Warden of the Riverbend Maximum Security Institution, or his designee, shall carry out the appellant's execution in accordance with Tennessee law on the 19th day of August, 2004, unless a stay is entered by this Court or by a federal court.[17] Counsel for Gregory Thompson shall provide to the Office of the Appellate Court Clerk in Nashville a copy of any order of stay. The Clerk shall expeditiously furnish a copy of any stay order to the Warden of the Riverbend Maximum Security Institution.

/s/ Frank F. Drowota III
FRANK F. DROWOTA III,
CHIEF JUSTICE

[17] The State contends that this Court should reconsider its prior order setting Thompson's execution for August 19, 2004, and re-set Thompson's execution to the earliest possible date. The State argues that reconsideration is justified because of the risk of re-litigation of the issue of competency and the potential for false claims and intentional delay. We decline to grant reconsideration.

ADOLPHO A. BIRCH, JR., J., concurring and dissenting.

I concur in Sections I and II of the majority opinion. I dissent, however, from the majority's conclusion that the petitioner has failed to make a threshold showing sufficient to warrant a hearing on his competence for execution.

In *Van Tran v. State,* 6 S.W.3d 257 (Tenn. 1999), this Court adopted a "cognitive test," for determining competency for execution, and held that under Tennessee law a prisoner is not competent to be executed "if the prisoner lacks the mental capacity to understand the fact of the impending execution and the reason for it." *Id.* at 266. *Van Tran* established a procedure whereby a prisoner alleging incompetency to be executed was required to make a "threshold showing" in the trial court where he was convicted "that his or her competency to be executed is genuinely in issue." *Id.* at 268. The Court explained what was meant by "threshold showing" as follows:

> [W]e adopt a rule that places the burden on the prisoner to make a threshold showing that he or she is presently incompetent. This burden may be met by the submission of affidavits, depositions, medical reports, or other credible evidence sufficient to demonstrate that there exists a genuine question regarding petitioner's present competency. In most circumstances, the affidavits, depositions, or medical reports attached to the prisoner's petition should be from psychiatrists, psychologists, or other mental health professionals. If the trial court is satisfied there exists a genuine disputed issue regarding the prisoner's present competency, then a hearing should be held.

Id. at 269 (citations omitted). The purpose of this threshold requirement is to avoid conclusory petitions and specious claims of incompetency made solely for the purposes of delaying execution. *Id.* at 268-69.

In this case, counsel for the petitioner submitted voluminous evidence of mental illness dating back at least eighteen years.[1] Furthermore, three highly qualified experts – two psychiatrists and one psychologist – submitted affidavits in support of the petition for a hearing on competency. All three opined that the petitioner suffered from severe, ongoing schizophrenia, and currently "lacks the mental capacity to understand the fact of the impending execution and the reason for it." *Report of Dr. John S. Rabun, M.D.*, p. 14 (January 28, 2004).[2]

In light of the foregoing evidence in the record, I disagree with the majority's conclusion that there is no "genuine, disputed issue" in this case to meet the threshold requirement. The majority cites to *Coe v. State*, 17 S.W.3d 193 (Tenn. 2000), for the proposition that mental illness alone is insufficient to meet the threshold requirement. In that case, however, prior to this Court's

[1] At one point, the petitioner's condition was so severe that, *on motion of the State Attorney General*, the Chancery Court for the Twentieth Judicial District appointed a conservator to make decisions regarding the petitioner's mental health and medical treatment.

[2] Likewise, Dr. Faye E. Sultan opined, "Mr. Thompson currently lacks the capacity to understand the fact of his scheduled execution or the reason for it." *Report of Dr. Faye E. Sultan, Ph.D.*, p. 3 (February 27, 2004). Dr. George W. Woods stated "Mr. Thompson remains so grossly psychotic that only the most superficial interrogation would not only reveal his profound psychosis, but his current incompetency [to be executed]." *Report of Dr. George W. Woods, M.D.*, p. 2 (February 27, 2004).

conclusion that Coe was competent to be executed, Coe actually had the benefit of a full competency hearing, where the facts of his mental status were thoroughly explored. Thus, I find *Coe* distinguishable. In my mind, there is a difference between requiring a "threshold showing" and requiring conclusive proof, as the majority seems to require here. Accordingly, I respectfully dissent. I would remand to the trial court for a full hearing on the issue of competency to be executed.

/s/ Adolpho A. Birch, Jr.
ADOLPHO A. BIRCH, JR., JUSTICE